INDEX.

	Page.
STATEMENT OF THE CASE	1
ASSIGNMENT OF ERRORS	5
ARGUMENT:	
I. The search was authorized by the National Prohibition Act—	
Section 26 authorizes an officer of the law to search a vehicle in which intoxicating liquor is being transported contrary to law, with or without a warrant	6
II. The search and seizure without warrant was permitted by the Constitution	20
Fourth and Fifth Amendments	21
The term "Unreasonable"	24
Arrest and search at Common Law	29
Basis of the Common Law power and of its extension by statute	35
"Unreasonable searches" in the light of the Eighteenth Amendment	39
1. The defendants were operating an automobile upon a public highway	42
(*a*) The automobile afforded an immediate and effective means for escape, for removal of the object of the search, and for continued perpetration of the crime	42
(*b*) The operation of an automobile upon a public highway is subject to such restrictions as the reasonable exercise of police power renders necessary	47
2. The property seized was the legitimate object of search and seizure	52
3. The defendants were engaged in committing a crime in the presence of the officers	61
4. There was probable cause for the search	64
III. The liquor which was seized was properly admitted in evidence	69
IV. Assuming that the search was unlawful as to defendant Carroll, it was not as to defendant Kiro	69
V. There was no error in admitting in evidence conversation between defendants and Government agents prior to arrest	71
CONCLUSION	71

Page.

APPENDIX A—Letter of R. E. Enright, Police Commissioner of New York City 76

APPENDIX B—Opinion of Judges Stern and Gordon, in the Court of Quarter Sessions of Philadelphia in *Commonwealth* v. *Street and Street* 78

AUTHORITIES.

CONSTITUTION OF THE UNITED STATES:
Fourth Amendment 21, 70
Fifth Amendment 21, 58
Eighteenth Amendment 39
ACTS OF CONGRESS:
Revised Statutes, Sec. 1014 10
Revised Statutes, Sec. 3061 34
Revised Statutes, Sec. 3064 34
Espionage Act, June 15, 1917, 40 Stat. 217, Title XI 11
National Prohibition Act, October 28, 1919, 41 Stat. 305—
Title II, Sec. 2 ..... 5, 7, 10
Title II, Sec. 3 6
Title II, Sec. 25 ..... 5, 7, 10, 60
Title II, Sec. 26 ..... 5, 6, 8, 10, 11–17, 60
Title II, Sec. 29 6
Supplemental Prohibition Act, November 23, 1921, 42 Stat. 222, c. 134, sec. 6 ..... 11, 16–19
CONGRESSIONAL DOCUMENTS:
Serial No. 7921, 67th Cong., 1st Sess., House Report No. 344 18
STATUTES OF PRINCE EDWARD ISLAND:
8 Edward VII, c. 13 48
TEXTBOOKS AND TREATISES:
Black on Constitutional Law, 2d Ed., Sec. 217 27
Cooley on Constitutional Limitations, 7th Ed., 431 53
Halsbury's Laws of England, Vol. 9, p. 310 35
Hawkins, Pleas of the Crown—
Vol 2, c. 12, Secs. 8–11 31
Vol. 2, c. 12, Sec. 20 ..... 30, 38
Vol. 2, c. 14, Sec. 1 38
Huddy on Automobiles, 5th Ed., Sec. 232 48
Lieber, Civil Liberty and Self-Government, 3d Ed., p. 67 38
Ruling Case Law, Vol. 2, 468 32
Wharton, Criminal Procedure, 10th Ed., Vol. I, Sec. 35 29
CASES:
Amos v. *United States*, 255 U. S. 313 46
Agnello v. *United States*, 290 Fed. 671 (Certiorari to U. S. Supreme Court granted April 30, 1923, 262 U. S. 738) 25
Ballard v. *State*, 43 Ohio State 340 30
Boyd v. *United States*, 116 U. S. 616 ..... 23, 53, 54, 59, 60, 69
Burt v. *Smith*, 181 N. Y. 1 65

CASES—Continued. Page.

City of Sioux Falls v. *Walser*, 45 S. Dak. 417 60
Commonwealth v. *Cheney*, 141 Mass. 102 30
Commonwealth v. *Klein & Goodstein*, 81 Pa. Superior Ct. 551 60
Commonwealth v. *Rubin*, Pa. Superior Ct., as yet reported only in Pittsburgh Legal Journal, Advance Sheets, Dec. 22, 1923, 921 46
Commonwealth v. *Schwartz*, Pa. Superior Ct., as yet reported only in Pittsburgh Legal Journal, Advance Sheets, Dec. 22, 1923, 927 60
Commonwealth v. *Street and Street*, 3 Pa. District and County Reports, 783 (Advance Sheets, Dec. 18, 1923) (Printed as Appendix B of this brief) 13, 43, 46, 49
Dreier v. *United States*, 221 U. S. 394 70
Entick v. *Carrington*, 19 Howell's State Trials, 1030 ..... 22, 26, 27, 37, 53
Getchell v. *Page*, 103 Me. 387 ..... 32, 38
Gouled v. *United States*, 255 U. S. 298 ..... 23, 25, 57, 59, 60, 69
Green v. *United States*, 289 Fed. 236 ..... 25, 63, 65, 67
Haywood v. *United States*, 268 Fed. 795 ..... 60, 70
Holker v. *Hennessey*, 141 Mo. 527 ..... 33, 38
Hughes v. *State*, 145 Tenn. 544 ..... 32, 35
Kneeland v. *Connally*, 70 Ga. 424 33
Lambert v. *United States*, 282 Fed. 413 ..... 19, 25, 64
Leach v. *Money*, 19 Howell's State Trials, 1002 ..... 22, 54
Mason v. *Rollins*, 2 Biss. (U. S.) 99 25
Michael v. *Matson*, 81 Kans. 360 67
Milam et al. v. *United States*, C. C. A., 4th Cir., No. 2152, decided Feb. 8, 1924, not yet reported 40, 46
Morrill, Ex parte, 35 Fed. 261 ..... 33, 62
Mundal v. *Minneapolis & St. Louis*, 92 Minn. 26 67
North v. *People*, 139 Ill. 81 33
O'Connor v. *United States*, 281 Fed. 396 61
Packard v. *Banton*, U. S. Supreme Ct., 126 Oct. Term, 1923, Opinion delivered Feb. 18, 1924 47
Paxton's Case, Quincy's Massachusetts Reports, 51 23
People v. *Bowen*, 198 N. Y. Sup. 306 60
People v. *Case*, 220 Mich. 379 ..... 23, 44, 46, 61
People v. *Cona*, 180 Mich. 641 33
People v. *DeCesare*, 220 Mich. 417 46
People v. *Margolis*, 220 Mich. 431 46
Powers, In re, 25 Vt. 261 26
Robinson v. *Richardson*, 13 Gray (Mass.) 454 ..... 27, 39
Runo v. *Williams*, 162 Cal. 444 65
Shovlin v. *Commonwealth*, 106 Pa. 369 30
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 ..... 57, 60, 69
Snowden, Ex parte, 12 Cal. App. 521 48
Sparf v. *United States*, 156 U. S. 51 71

CASES—Continued. Page.

State v. *Chucpola*, 120 Atlantic (Del.) 212 60
State v. *Edwards*, 51 W. Va. 220 33
State v. *Freeman*, 86 N. C. 683 30
State v. *Hassan*, 149 Iowa, 518 33
State v. *Krinski*, 78 Vt. 162 60
State v. *Mausert*, 88 N. J. Law, 286 33
State v. *Mullen*, 63 Mont. 50 66
State v. *Pauley*, 192 Northwestern (N. D.) 91 60
State v. *Reichman*, 135 Tenn. 653 35
State v. *Simmons*, 183 N. C. 684 60
United States v. *Bateman*, 278 Fed. 231 ..... 19, 38, 41, 61, 67
United States v. *Crossen*, 264 Fed. 459 19
United States v. *Daison*, 288 Fed. 199 19
United States v. *Fenton*, 268 Fed. 221 ..... 46, 61, 64
United States v. *Friedman*, 267 Fed. 856 11
United States v. *Hilsinger*, 284 Fed. 585 ..... 61, 62
United States v. *McBride*, 287 Fed. 214 ..... 33, 60, 63
United States v. *Metzger*, 270 Fed. 291 11
United States v. *O'Dowd*, 273 Fed. 600 61
United States v. *Rembert*, 284 Fed. 996 ..... 15, 19
United States v. *Snyder*, 278 Fed. 650 ..... 29, 33, 61, 65
United States v. *Welsh*, 247 Fed. 239 60
Wakely v. *Hart*, 6 Binney (Pa.) 316 26
Walker v. *Commonwealth*, 40 Pa. Superior Ct. 638 48
Weeks v. *United States*, 232 U. S. 383 ..... 32, 56, 60, 69
Wilkes v. *Wood*, 19 Howell's State Trials, 1154 ..... 22, 26, 54
William K. Rodgers, In re, 7 Eastern Law Reporter, 212 48
Wilson v. *United States*, 221 U. S. 361 70

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GEORGE CARROLL AND JOHN KIRO, plaintiffs in error, v. THE UNITED STATES. } No. 117.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

SUBSTITUTED BRIEF FOR THE UNITED STATES ON REARGUMENT.

STATEMENT.

The case comes direct to this court upon a writ of error to the District Court of the United States for the Western District of Michigan, under Section 238 of the Judicial Code. It involves the construction and application of the Fourth and Fifth Amendments to the Constitution.

The plaintiffs in error, George Carroll and John Kiro, whom we shall refer to hereafter as the defendants, were tried and convicted of unlawfully transporting intoxicating liquor in violation of the National Prohibition Act. (R. 2, 15.) The conviction resulted from the introduction in evidence of certain liquor

taken from an automobile in the possession of the defendants by Federal prohibition officers, who searched it, seized the liquor, and arrested the defendants without any previous warrant either of arrest or of search. Upon the trial of the case the defendants seasonably objected to the introduction of the liquor in evidence and to all testimony of its discovery offered by the officers who made the search. The defendants offered no evidence whatever (R. 14), and the case went to the jury upon that produced by the Government (R. 14). The charge of the court was not open to exception, save upon the same ground urged in the defendants' petitions for the return of the liquor and their objection to its use at the trial. (R. 14–15.) A summary of the evidence is contained in the bill of exceptions (R. 7) from which the following facts and circumstances appear:

Fred. Cronenwett was Chief in Charge of the Federal Prohibition Department in the district about Grand Rapids, Michigan (R. 11). Arthur Scully and Mr. Thayer were Federal Prohibition agents working under him. (R. 7.) Walter Petersen was Drug and Liquor Inspector of the State Department of Public Safety of the State of Michigan. (R. 10.) On September 29, 1921, Cronenwett and Scully were in the latter's apartment at 122 Oakes Street, Grand Rapids, Michigan. George Carroll, John Kiro and one Kruska came to that address in the Oldsmobile roadster which was subsequently searched. (R. 8, 11.) Cronenwett was introduced to the visitors under the name of Stafford, told them he was em-

ployed by the Michigan Chair Company, and desired to obtain three cases of whiskey. A price was agreed upon and the defendants promised to deliver the liquor within a half or three-quarters of an hour. They stated that it was in the eastern end of Grand Rapids and they would have to go there to get it. Later they returned, and Kruska came up to the apartment and stated that they were unable to get the liquor that night because a man by the name of Irving from whom they expected to obtain it was not in, but that it would be delivered the following day at ten o'clock. The liquor was not delivered on that day. (R. 8, 11.) About a week later, on October 6, 1921, Cronenwett and Scully were patrolling the highway leading from Grand Rapids to Detroit. While Scully was away eating lunch the two defendants passed Cronenwett in the same Oldsmobile roadster which they had been driving the week before. Scully returned about twenty minutes after they had passed. Thereupon Cronenwett and Scully drove after them for the purpose of observing their movements. They followed them as far as East Lansing, where they "lost trace of them" and "gave up the chase." (R. 8, 11–12.)

Two months later, on December 15, 1921, Cronenwett, Scully, Thayer, and Petersen were patrolling the highway between Detroit and Grand Rapids looking for violators of the Prohibition law. They were driving eastwardly in the direction of Detroit and while upon the highway between Lowell and Saranac the defendants, going westwardly towards

Grand Rapids, passed them in the Oldsmobile roadster already referred to. The defendant Kiro was driving and defendant Carroll was riding in the seat beside him. (R. 7, 12.) Cronenwett and Scully immediately recognized both the defendants and the automobile, and after having passed it some distance they turned about, followed the defendants, overtook them, and obliged them to stop. Cronenwett asked them to get out of the car, which they did. He then raised the back part of the roadster and raised the cushion of the seat, finding no liquor in either place. He then struck the back cushion and found that it was very hard, much harder than the upholstery of an automobile seat ordinarily is. It was practically solid. (R. 13.) Thereupon the upholstery was removed, disclosing 68 bottles of liquid which, upon subsequent examination and analysis, proved to be whiskey and gin. Petersen then brought the liquor and the defendants to the office of the United States Marshal at Grand Rapids, the other men remaining upon the highway to search for other violators of the Prohibition Law. (R. 7, 12.)

At the time of the search and seizure the Prohibition officers had neither a warrant of arrest nor a search warrant, and had no other grounds than those above stated for suspicion that these defendants were transporting liquor along the highway on that day. (R. 8.)

From the facts stated it thus appears:

(1) That the officers who made the arrest and search were Federal prohibition officers charged with

the duty of enforcing the National Prohibition Act (Act of October 28, 1919, 41 Stat. 305, c. 85, Title II, Secs. 2, 25, 26); (2) that these officers were engaged in the performance of that duty; (3) that they had fair grounds for suspecting that the defendants were bootleggers; (4) that they knew the automobile which the defendants used in that business; (5) that they knew that the highway between Detroit and Grand Rapids was habitually used by violators of the National Prohibition Act to transport liquor; and (6) that the defendants, at the time of the arrest and search, were traveling in that automobile from the direction of Canada, a known source of supply, towards Grand Rapids, their known market.

The ultimate question here involved is whether the arrest of the defendants and the search of their automobile under these circumstances was lawful.

ASSIGNMENT OF ERRORS.

Six errors have been assigned. (R. 16.) The first five raise the same question and are in substance as follows:

> That the search made by the Federal Prohibition Agents was unlawful, and the liquor seized was used in evidence in violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The sixth error is as follows:

> That the trial court erred in admitting in evidence, over respondents' objection, certain

testimony of Arthur Scully, as to conversation alleged to have taken place with Mr. Cronenwett and respondents in September, 1921.

The legality of the arrest, as distinguished from the search, was not raised in the court below, nor is it assigned as error in this Court; and the law of arrest will be treated herein only so far as is necessary because of its close analogy to the law of search.

A lawful search and seizure by a Federal officer is one which is authorized by statute and permitted by the Constitution. Our first inquiry therefore relates to the statute; our second, to its constitutional validity; and we shall endeavor to show to the Court that—

I. The search was authorized by the National Prohibition Act, and

II. The search was permitted by the Constitution.

ARGUMENT.

I.

The search was authorized by the National Prohibition Act.

Section 26 authorizes an officer of the law to search a vehicle in which intoxicating liquor is being transported contrary to law, either with or without a warrant.

[All sections referred to are contained in Title II of the National Prohibition Act, 41 Stat. 305, 307, c. 85.]

The unlawful transportation of liquor is forbidden by Section 3 of the National Prohibition Act, and by Section 29 the first offense is made a misdemeanor

punishable by a fine not in excess of $500.00. The powers and duties imposed upon officers engaged in the enforcement of the law, so far as they are relevant to this case, are contained in Sections 2, 25, and 26, which are here printed in full for the convenience of the Court:

> SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said Section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217 et seq.).
>
> SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in

violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found

therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous

> receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

That Section which not only empowers but directs enforcement officers to search and to seize without warrant, where the circumstances require it, is Section 26, the true purpose and intent of which may be found only by an examination of the related sections.

Section 2 designates the officers charged with the enforcement of the Act, those authorized to swear out and to serve *warrants of arrest*, and those authorized to issue such warrants. By reference to Section 1014, Revised Statutes, it also designates the officers authorized to issue *search warrants*.

Section 25 renders unlawful the possession of any liquor, or property designed for the manufacture of liquor, and destroys all property rights in and to it.

It then provides that in cases where search warrants are to be issued the procedure for their issue, service, and return shall be that provided by Title XI of the Espionage Act of June 15, 1917 (40 Stat. 217, 228). Reference to that title discloses that it is a comprehensive statute with a score of separate sections, setting out with great particularity the procedure to be followed. In the instant case we need refer to it no further than to observe that the National Prohibition Act adopts *only* its procedure; and the provision contained in its second section, which limits the issuance of search warrants to property used in committing a felony, does not limit Section 25 of the Prohibition Act to cases of felony. (See *United States* v. *Friedman*, 267 Fed. 856; *United States* v. *Metzger*, 270 Fed. 291.)

The provisions of Section 25 relate primarily to the search of fixed property as distinguished from automobiles and other vehicles. It deals with the "private dwelling," the traditional Englishman's "castle," with particular care and solicitude, defining specifically the term "private dwelling" and limiting the right of search to cases of unlawful *sale*, thus excluding *manufacture*. A further provision for the protection of dwelling houses is contained in the supplemental act of November 23, 1921, 42 Stat. 222, c. 134, Sec. 6, to which we shall refer hereafter.

Having made these provisions, Congress next turned its attention to the matter of transportation, which obviously presented a different and more difficult problem. It is significant that this problem is

dealt with in a separate section. Congress recognized the tremendous obstacles which officers of the law would encounter in their efforts to detect and punish this form of crime.

The language used is also significant. The duty imposed upon the officer is direct and peremptory—"*It shall be his duty to seize* any and all intoxicating liquors *found* therein being transported contrary to law." It contemplates a *finding* and directs a seizure, but it does not direct the officer first to apply for or obtain a search warrant. Intoxicating liquors which are "being transported" must necessarily be in containers, bottles, barrels, or casks, which of themselves would prevent any officer from knowing positively the nature of their contents until he had made a more careful examination than can be made by the eye. And in the case of illegal transportation, of course the liquor would be further concealed from examination by covering or hiding the containers.

He is directed to seize only in case of liquor which is "being transported contrary to law," which necessarily requires that whenever he has knowledge that liquors are being transported he shall be empowered to determine whether the transportation is lawful or unlawful, and to this end that he shall demand of the person transporting, evidence of his permit.

Again, he shall seize whenever he shall "*discover* any person *in the act* of transporting." Much refinement has been indulged in by the courts which have considered the meaning of the word "discover" as used in this section. In an opinion of unusual ability

delivered in the Court of Quarter Sessions of Philadelphia, in *Commonwealth* v. *Street and Street*, 3 Pa. District & County Reports 783 (advance sheets of December 18, 1923), Judges Stern and Gordon, considering the meaning of the word as used in the Pennsylvania and the Federal statutes, said (at p. 786) (see Appendix B of this brief, post, p. 83 ff):

> It will thus be seen that the Pennsylvania statute expressly gives the right to an officer to make a seizure "with or without a warrant" if he shall "discover" the person in the act of transporting intoxicating liquor. The word "discover," which also appears in the Federal act, has been made the subject of extended discussion respecting its connotation as thus employed in this legislation. Some courts have taken the ground that by "discover" is meant that the officer without any preliminary manual action must actually see, hear, or smell the liquor. This has resulted in a fineness of interpretation which makes the subject amusing. A bottle of liquor may be so inclosed as to make visual evidence of its existence impossible, and thus an officer would be denied the right of further examination in order to enforce the law and apprehend the lawbreaker. It is argued that if the liquor be so concealed in the passing automobile as to render it invisible, the officer is powerless to act, whereas if the cork of a bottle protrudes, or if a blanket be so carelessly placed over the contents of the vehicle as to allow a peep at the articles which it is intended to conceal, the officer is thereby afforded such

reasonable and probable cause as to justify his further action. It is not believed that the practical and common sense nature of our people and of the law which that nature has through so many centuries developed will permit of such academic and finespun distinctions. As a matter of fact, the word "discover" has no such limited meaning. As defined in Webster's International Dictionary, it means to "uncover; to remove or lift (any covering); to lay open to view; to reveal; to make known; to show (what has been secret, unseen or unknown); to manifest; to show; exhibit; betray; to explore; examine; reconnoiter; to obtain for the first time sight or knowledge of, as of a thing existing already, but not perceived or known; to find out; to ascertain; espy; detect; descry." In other words, the essential nature of the word "discover" involves, not a facile observation, but rather a detection as the result of preliminary measures by way of uncovering, revealing, and laying open to view. The very etymological analysis of the word would suggest an uncovering rather than a mere observation of something already exposed to the action of the senses.

We readily conclude, therefore, that both the Federal and state acts do not intend by the use of the word "discover" to limit the right of the officer to proceed only upon the evidence of the optic, auditory, or olfactory nerves, but, on the contrary, were intended to and do give such right when a "discovery" is made as the result of an "uncovering,"

> "revealing," or "exploring." Furthermore, the state act expressly provides (section 8) that "the right to a search warrant, as provided for in this section, shall be in addition to all other rights of search and seizure now existing under law," and at common law officers have had the right from time immemorial to conduct reasonable searches and seizures without warrant.

In *United States* v. *Rembert* (1922 S. D. Tex.), 284 Fed. 996, 1006, the court said:

> Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term "discovery," as used in this act is to be construed in the light of the principles of American and English common law, defining when arrests can be made without warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officer actually see, before apprehension is made, the liquor the subject of the apprehension.

The act clearly contemplates that when there is probable cause for believing that liquor is being unlawfully transported, whether that knowledge be gained from trustworthy information imparted by

others, from a knowledge of facts which point clearly to the commission of the offense, or from the actual use of the senses of sight and smell upon the spot, it is their duty to seize the liquor and arrest the offender, even though the circumstances preclude, as they usually do, the possibility of obtaining a warrant. Congress knew, what all know, that to require the use of a warrant under all circumstances, in dealing with the problem of transportation, would have deleted the word "transportation" from the Eighteenth Amendment and from the National Prohibition Act. And if it intended that rum runners carrying their cargo along our highways should be permitted to speed on their way past the officers of the law in perfect security, while the officers went scurrying to the nearest available place to obtain a warrant, it certainly would have protected the officers from the charge of dereliction of duty by stating specifically that the duty imposed upon them by Section 26 should not be performed unless a warrant were first obtained.

The conclusion that officers may arrest and search without warrant under authority of Section 26, is further supported by the action of Congress in enacting Section 6 of the Act of November 23, 1921, 42 Stat. 222, c. 134. That section provides as follows:

> That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in

> the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

At the time this act was passed the National Prohibition Act had been in force for practically two years. The extent of the smuggling of liquors by rum-running automobiles was well known and the difficulties of suppressing the evil were fully appreciated. Congress had its attention specifically directed to the whole question of search and seizure at the time the Supplemental Prohibition Act was pending when Senator Stanley introduced an amendment to H. R. 7294, which later became the Supplemental Prohibition Act, designed to prohibit all search without a warrant. The introduction of this amendment provoked a long debate and a careful review and consideration of the entire subject of search and seizure by the Sixty-seventh Congress.

The so-called Stanley Amendment was adopted by the Senate when the bill was on its passage, along with numerous other amendments, but when the measure was returned to the House it was referred to the House Judiciary Committee for consideration of the Senate amendments. At that

time Mr. Volstead, who was Chairman of the House Committee on the Judiciary on August 13, 1921, filed Report No. 344 to accompany H. R. 7294, in which it was recommended that the House disagree to Senate Amendment 32, commonly known as the Stanley Amendment. The report of Mr. Volstead contained excerpts from the laws of a number of the States relating to the seizure of vehicles illegally transporting liquor, and pointed out the fact that if the Amendment as passed by the Senate were incorporated in the law, it would defeat prohibition enforcement. The Committee report stated (*Cong. Doc. Serial No. 7921; 67th Cong., 1st sess., House Report No. 344, p. 3*):

> Not only does this amendment prohibit search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum-running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.

The result was that the Senate Amendment, along with a number of others, was disagreed to by

the House and the measure was submitted to a committee of conference. The Conference Committee recommended the language which was subsequently adopted in Section 6 of the Supplemental Prohibition Act which we have quoted above.

Thus Congress expressly refused to invalidate all searches without warrant, because it recognized the necessity of such action in the case of transportation by automobile; and it limited the provisions of the Act of 1921 to dwelling houses in order that the authority to search without warrant contained in Section 26 might continue to be exercised.

Referring to the Act of 1921, the District Court for the Southern District of California, in *United States* v. *Bateman*, 278 Fed. 231, 233, said:

> If Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its convictions, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without probable cause.

Other cases which hold that the statute confers authority upon the officers to search without a warrant are:

> *United States* v. *Crossen*, 264 Fed. 459, 462.
> *United States* v. *Daison*, 288 Fed. 199, 202.
> *Lambert* v. *United States*, 282 Fed. 413, 417.
> *United States* v. *Rembert*, 284 Fed. 996, 1006.

The conclusion that the search in the instant case was authorized by statute, brings us to the second and more important question of its constitutional validity.

II

The search and seizure without warrant was permitted by the Constitution.

The plaintiffs in error invoke the guaranties of the Fourth and Fifth Amendments to the Constitution of the United States. These great bulwarks of personal liberty were designed to protect three rights which Englishmen have always cherished: Security of the person against unwarranted arrest, security of property against the unwarranted invasion of public officers, and immunity from self-incrimination. The particular question presented in this case comes for the first time to the bar of this Court, though it has been frequently met in recent years by officers charged with the enforcement of many State and Federal laws and has been frequently considered by the lower Federal courts and those of the States. The fact that this case had its origin in the Eighteenth Amendment and the National Prohibition Act is a purely adventitious circumstance, *and the question now to be determined has an importance which reaches far beyond the incidental problem of enforcing the liquor laws.* It has arisen out of the invention, the rapid development, and the general use of automobiles as a means of transportation. Prior to the invention of the automobile, the well-settled rules of the common law and the decisions of this

and the several State courts had established, with comparative certainty, a proper balance between the necessities of public authority, on the one hand, and the demands of personal liberty, on the other. The invention of this remarkable instrument of transport, however, has operated to disturb that balance. Prior to this invention no species of property, real or personal, had taken such form as to require a reconsideration or readjustment of these well-settled rules of law; but the advent of the motor car requires us to consider in this case whether the same rule which applies to a man's dwelling shall also apply to his automobile *when using a public highway*.

The novelty of the question in this Court and its importance in suppressing crime and indeed in ending the unprecedented "crime wave" seem to justify a rather careful review and examination of the law. The constitutional provisions involved are as follows:

FOURTH AMENDMENT.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT.

> No person * * * shall be compelled in any criminal case to be a witness against himself. * * *

It will be observed that the Fourth Amendment contains two separate and distinct provisions: (1) It prohibits, generally, *unreasonable* searches and seizures.

This was designed to prevent all searches and seizures, whether with or without a warrant, if, under the circumstances, they be found to be "unreasonable."

(2) It prohibits the issuance of warrants of arrest or of search except upon probable cause shown, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

This was designed to prevent forever the use of general warrants, which had become so obnoxious by their use in England to suppress seditious libels, and by their use in this country in the colony of Massachusetts Bay to assist in the enforcement of the revenue laws. The former were attacked in the famous cases of *John Wilkes, Esq.*, v. *Robert Wood, Esq.*, 19 Howell's State Trials, 1154 (1763); *Dryden Leach* v. *John Money, James Watson and Robert Blackmore, Three of the King's Messengers*, Id. 1002 (1765); and *John Entick* v. *Nathan Carrington and Three Other Messengers in Ordinary to the King*, Id. 1030 (1765), and held by the Court of King's Bench to be illegal. The famous judgment of Lord Camden in the last cited case has been justly recognized as a landmark in the history of civil liberty. The offensive Writs of Assistance were attacked in the Superior Court of Judicature of

the Province of Massachusetts Bay in *Paxton's case* (Quincy's Massachusetts Repts., 51,–1761). It was here, as John Adams later declared, that "the child Independence was born" of the impassioned oratory of James Otis, Jr., who, resigning his office as Solicitor General and declining to accept compensation, appeared before the Court and opposed the issuance of the writs in an eloquent address lasting five hours. The history of these celebrated cases has been so fully and ably narrated in the opinion of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, and in the brief filed by counsel for Felix Gouled in *Gouled* v. *United States*, 255 U. S. 298 (among whom was former Justice Charles E. Hughes), that it need not be here repeated. It is sufficient to note that the Fourth Amendment, so strongly relied upon by the defendants in the instant case, found its origin in these great cases.

In the recent case of *People* v. *Case*, 220 Mich. 379, 387, the Supreme Court of Michigan, referring to the constitutional provisions of that State, which are substantially identical with those in the Federal Constitution, said, in contrasting the two provisions contained in the Amendment:

> Each is clear, independent and complete by itself. The first recognizes search and seizure regardless of process, but restricted by a comprehensive, master adjective compelling in performance exercise of moderation and good judgment to exclusion of prejudice, temper and passion. The second deals with warrants

> where time and circumstances permit or in reason require them, specifying restrictive essentials which protect the officer serving them, if fair on their face, even though ultimately shown unfounded and unreasonable, * * *

In the case at bar we are concerned primarily with the first clause of the Amendment. It is admitted that no warrant was issued.

The Term "Unreasonable."

One can not read this first clause without being impressed with the use of the term "unreasonable." If the framers of the Constitution had intended to fasten upon the Congress throughout succeeding generations the rules of law respecting arrest and search which then prevailed, a few words would have sufficed for the purpose. In this, as in so many other clauses of that document, however, they deliberately chose a general term which might, with the progress of society, be adapted to the necessities arising from constantly changing conditions. The term "unreasonable," like that of "excessive bail," "excessive fines," "freedom of speech," "cruel and unusual punishment," and "due process of law," is one which must find its exact connotation in the light of social, political, and economic conditions as they change and develop from one generation to another.

It is obviously impracticable to define "unreasonable searches and seizures." What is reasonable or unreasonable is a judicial question which must be

determined in each case upon the particular facts presented. *Mason* v. *Rollins*, 2 Biss. (U. S.) 99, 102; *Gouled* v. *United States*, 255 U. S. 298; *Agnello* v. *United States*, 290 Fed. 671, 676 Certiorari to U. S. Sup. Ct. granted, Apr. 30, 1923, 262 U. S. 738; *Lambert* v. *United States*, 282 Fed. 413, 417.

We do discover, however, certain definite criteria by which reasonableness may be judged. *And first we must observe that the presence or absence of a warrant, per se, is not such a criterion.*

In *Gouled* v. *United States*, 255 U. S. 298, 301, the Court said:

> Every search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment. It is the right and duty of the Government to secure evidence of crime, even from the accused himself, if this can be done without violating his constitutional rights.

In *Green* v. *United States*, 289 Fed. 236, 238, the Court said:

> It is settled that this amendment contains no prohibition against arrest, search, or seizure without a warrant, but only denounces unreasonable searches and seizures.

It must be conceded that at the time of the adoption of this Amendment the common law recognized the right both of arrest and search without warrant in proper cases. The Amendment was not designed to declare them unreasonable. Such a prohibition would have completely abrogated the salutary prin-

ciples of the common law and proven fatal to the safety and welfare of the public. Similar provisions are embodied in the Constitutions of all of the States, but under them the power and authority of officers to arrest, search, and seize without warrant, in proper cases, is uniformly recognized.

> It is nowhere said that there shall be no arrests without warrant. To have said so would have endangered the safety of society. (*Wakely* v. *Hart*, 6 Binney (Pa.), 316, 318.)

> It [constitution] has never been supposed to prohibit arrests by private persons, or without warrant, in that class of cases where delay would be perilous. Necessity is the first law of government as well as of nature, and is not to be abrogated by implication. (*In re Powers*, 25 Vt. 261, 266.)

Search *with a warrant* may yet be unreasonable, either because the warrant is illegally issued or because the search in some particular exceeds the limits of the warrant. In the cases of *Wilkes* v. *Wood* and *Entick* v. *Carrington*, already cited, warrants had been issued, yet the searches made thereunder were declared illegal, and under our Constitution would be deemed unreasonable. On the other hand, a search *without a warrant* may yet be reasonable, because made in a proper case and executed in a lawful manner.

The presence or absence of a warrant, therefore, is not *per se* a criterion by which to determine the reasonableness of an arrest, search or seizure. The fol-

lowing are the principal criteria, and they are found to apply whether there be warrant or no warrant:

(1) *Does the statute authorize it?* The Amendment "while regulating the issuance of such warrants, does not grant the power to issue them. Consequently no court or judge has inherent power to grant such a writ, but it must be authorized by statute." (Black on Constitutional Law, 2d Ed., sec. 217, page 504.)

(2) *Is it employed to enforce the criminal law?* A search warrant is distinctively criminal process. It can not be lawfully issued in any civil case. *A fortiori*, a search without a warrant can not be made in any civil case. A search made with or without a warrant in aid of any party in a civil action would unquestionably be unreasonable and unconstitutional. In the case of *Robinson* v. *Richardson* (13 Gray (Mass.), 454,457), the Court said:

> All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of penal laws, must be held to be unreasonable, and consequently under our Constitution unwarrantable, illegal and void.

(3) *Is the search made solely for the purpose of securing evidence?* The immunity from self-incrimination, safeguarded by the Fifth Amendment, was well established in the common law long prior to the

famous decision of Lord Camden in *Entick* v. *Carrington, supra*. This immunity operated under the common law and now operates under our Constitution to render unreasonable any search which is purely exploratory, save only that which may be made immediately after an arrest. It operates also to put certain classes of property completely beyond the pale of a search, whether the officer be armed with a warrant or not. The search for property, letters, or papers, which are not part of the *corpus delicti*, nor means or instruments of crime, but which are valuable to the Government only as evidence, is completely beyond its reach. A search for such property and a seizure thereof without warrant is unreasonable, and it is beyond the power of the legislature to authorize a warrant for such purpose.

(4) *Is the search a general or special one?* The promiscuous search by officers of the law directed against no particular person and not in search of any particular thing is unreasonable. The express prohibition against the issuance of general warrants manifestly stamps with the sign of unreasonableness any general search made without a warrant.

(5) *Is there probable cause?* Probable cause is a condition precedent to every reasonable search, either with or without a warrant. The Constitution expressly requires it in advance of a warrant, and obviously it must exist to justify a search without a warrant.

These are the principal standards by which the reasonableness of a search is to be determined. The enumeration is not complete, however, for peculiar circumstances may exist in particular cases which will materially affect the question. Thus, for example, at common law a search ordinarily must be made in the daytime. But those criteria which we have mentioned, and which we shall discuss more in detail in the later portions of this brief, include those which are particularly applicable to the instant case.

Arrest and Search at Common Law.

Before proceeding with the particular facts of the case at bar, it must be observed that little assistance can be gained in the determination of this case by reference to the particular rules of the common law relating to arrest and search. Counsel for the defendants in their brief (at page 9) assert that at common law an arrest without warrant could be made in but two cases: (1) Where a felony is committed or attempted in the presence of an officer, or where he has reasonable grounds to suspect that one has committed a felony; and (2) where a misdemeanor is committed in his presence and the offense amounts to a breach of the peace. There is considerable conflict in the authorities as to whether the rule last stated is correct. Many of them insist that the right at common law to arrest without warrant extended to all misdemeanors committed in the presence of an officer. (*United States* v. *Snyder*, 278 Fed. 650, 653, and authorities there cited; Wharton on Criminal Procedure, Tenth Ed., Vol. I, section

35, p. 74.) If the rule be as stated, it is certain that there were notable exceptions to it, for in *Hawkins, Pleas of the Crown*, Vol. 2, Chap. 12, Section 20, we read:

> Yet it is holden by some, That any private person may lawfully arrest a suspicious night walker, and detain *him* till he make it appear, that he is a person of good reputation. Also it hath been adjudged, That anyone may apprehend a common, notorious cheat, going about the country with false dice, and being *actually caught playing with them*, in order to have him before a justice of the peace: For the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate, would often give them an opportunity of escaping. And from the reason of this case it seems to follow, That the arrest of any other offenders by private persons, for offenses in like manner scandalous and prejudicial to the public, may be justified.

Whatever may have been the rule of common law, however, it is well settled that the legislature has power to authorize arrest without warrant in proper cases. This power has been exercised in numerous familiar instances, such as carrying concealed deadly weapons (*Ballard* v. *State*, 43 Ohio State, 340), gambling (*Shovlin* v. *Commonwealth*, 106 Pa. 369), intoxication (*State* v. *Freeman*, 86 N. C. 683; *Commonwealth* v. *Cheney*, 141 Mass. 102), and many

other offenses, notable among which may be mentioned violations of traffic laws by automobilists and infractions of other municipal ordinances. No one would question the authority of the motor-cycle officer to stop and arrest a driver who exceeds the speed limit, nor even to stop anyone, whether violating the law or not, to ascertain whether the machine is being driven by one duly licensed to operate it. Nor would anyone question the power or the authority of an officer to arrest one whom he sees spitting on the street in violation of a municipal ordinance. In these and innumerable other instances the authority of the officer to make an arrest immediately for an offense committed in his presence is uniformly recognized.

If the rules of the common law had never been extended by statutory enactment to meet the requirements of modern conditions, police regulation to-day would be hopelessly inadequate and ineffective; and, on the other hand, if some of the things which the rules of the common law permitted were enforced to-day we would regard them as grossly unreasonable. As a single instance, we may cite the grounds upon which the common law recognized the right of private persons to arrest offenders upon suspicion. In *2 Hawkins, Pleas of the Crown*, Chap. 12, we read:

> Sect. 8. As to the first particular, viz: What are sufficient causes of suspicion, I shall take notice of some of the principal of them, which are generally agreed to justify the arrest of an innocent person for felony.

> Sect. 9. First, The common fame of the country. But it seems, That it ought to appear upon evidence, in an action brought for such an arrest that such fame had some probable ground.
>
> Sect. 10. Secondly, The living a vagrant, idle and disorderly life, without any visible means to support it.
>
> Sect. 11. Thirdly, The being in company with one known to be an offender, at the time of the offense; or generally at other times keeping company with persons of scandalous reputations, etc.

For a private person, or even an officer, to arrest one to-day upon a charge of felony "upon the common fame of the country" would be challenged instantly.

With respect to the right of search at common law, we may observe that the rules were generally the same as those relating to arrest, owing to the fact that search is exclusively a criminal process. Wherever one might be legally arrested without a warrant for a crime committed in the presence of an officer, his person and property might be searched without warrant to discover and seize the means, instruments, or fruits of his crime, or such things as might be used in its continued or repeated perpetration. *Weeks* v. *United States*, 232 U. S. 383, 392; *Hughes* v. *State*, 145 Tenn. 544, 566; 2 Ruling Case Law, 468.

In *Getchell* v. *Page*, 103 Me. 387, 390, the Court said:

> It is well settled that an officer making an arrest upon a criminal charge may also take

> into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it.

To the same effect are:

> *Holker* v. *Hennessey*, 141 Mo. 527, 540.
> *State* v. *Mausert*, 88 N. J. Law 286.
> *State* v. *Edwards*, 51 West Va. 220, 230.
> *Kneeland* v. *Connally*, 70 Ga. 424.
> *People* v. *Cona*, 180 Mich. 641, 651.
> *State* v. *Hassan*, 149 Iowa, 518, 523.
> *North* v. *People*, 139 Ill. 81, 107.

"The analogy between arresting and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case." (*United States* v. *McBride*, 287 Fed. 214, 218.) In each, the official responsibility of the officer and his own personal observation are considered, in view of the necessity for prompt action, as a sufficient substitute for the judgment of the officer charged with issuing warrant. (*Ex parte Morrill*, 35 Fed. 261, 267; *United States* v. *Snyder*, 278 Fed. 650, 657.)

But the rules of the common law no more exhausted the possibilities of reasonable *search* without warrant than they did those of *arrest* without warrant, and the statutes of both Federal and State governments furnish instances in which this right has been extended to meet new conditions. For the enforce-

ment of the customs laws Congress has provided, by Section 3064, R. S., as follows:

> The Secretary of the Treasury may from time to time prescribe regulations for the search of persons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government, under such regulations.

By Section 3061, R. S., revenue officers are authorized to "stop, search, and examine" any "vehicle, beast, or person," within or without their district, when they shall suspect that there may be concealed upon or within them any dutiable merchandise.

Under this authority and the regulations made by the Secretary of the Treasury, the baggage of every returning American tourist is subject to the most minute and annoying scrutiny, and the examination extends, wherever there is the slightest ground for suspicion, to a like examination of the person. No warrant is required or obtained. The search is recognized as reasonable under the circumstances because obviously necessary.

The several State legislatures have provided for search, with or without warrant, of persons carrying concealed deadly weapons, vagrants, disorderly and intoxicated persons, prostitutes, gamblers, trespassers upon railroad property, or violators of the game and fish laws. No one would question the right of the

game or fish warden to stop one engaged in hunting or fishing, demand that he exhibit his license, and that he display the game or fish which he has caught or killed, and in the event of refusal the right of the officer to proceed and search his hunting jacket or his fishing basket. The police regulations concerning game and fish could be effectively enforced in no other way.

Basis of the Common Law Power and of Its Extension by Statute.

A similar extension of the common law power of arrest and search without warrant may be found in the statutes of England. (*Halsbury's Laws of England*, Volume 9, page 310.)

If it were necessary to bring the instant case squarely within the specific rules of the common law, authorities could be cited which hold that violations of the liquor laws are "breaches of the peace." That being a generic term, includes all violations of public peace or order and includes the unlawful sale, actual or threatened, of intoxicating liquor. (*State* v. *Reichman*, 135 Tenn. 653, 667–669; *Hughes* v. *State*, 145 Tenn. 544, 571–573.) But such construction is not necessary, for the only significance of the specific rules of the common law in their relation to the case at bar lies in the fact that they show clearly that an arrest and search without warrant were not considered *unreasonable* where two circumstances existed:

(1) The offense was committed within the presence or observation of the officer or within his knowledge so that his knowledge and official responsibility might fairly be substituted for the sanction of the oath made by an informer before a magistrate; and

(2) The prompt action of the officer was necessary in order to prevent the escape of the felon or misdemeanant, or the removal of the fruits, or instrumentalities, of his crime.

Where these conditions were present an arrest or search without a warrant was not unreasonable at common law. And so it is that by statute from time to time new cases have been provided for, where arrest or search without warrant has been recognized as reasonable because these circumstances were present.

The instant case is clearly within the reason of the common law rules. The distinctive character of this case lies in the fact that the necessity for prompt action, which is one of the essential conditions, arises not out of the character of the offense, but out of the character of the property to be searched—a factor which has not heretofore created such necessity.

We recognize the fact that reasoning based upon public necessity may be employed to extend the powers of police officers to unreasonable extremes. The fact that it is convenient or desirable in the interest of the public that a right of search without warrant should exist is, of course, not a conclusive argument that it does exist. Nevertheless, it is a consideration which must be given great weight in

determining whether or not the exercise of such a power is reasonable. It is noteworthy that every concession which personal liberty has made to police authority, every so-called invasion of the liberty or privacy of the individual which is now universally recognized under well-settled rules of law has been founded upon public necessity. This was recognized by Lord Camden, who, in rendering his famous judgment in *Entick* v. *Carrington*, 19 How St. Tr. 1030, 1066, said:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good.

Imprisonment, as a punishment for crime, is an abridgment of personal liberty founded upon the theory that it is necessary for the protection of society. Again, although the legal presumption that one is innocent of crime prevails until after an adjudication of his guilt by a court of competent jurisdiction, yet he may be apprehended and imprisoned to await trial, unless, in the case of a bailable offense, he is willing and able to furnish such security for his appearance as the law may require. However inno-

cent he may be, he may be deprived of his liberty upon the oath or affirmation of anyone ready to swear to the necessary facts.

> Even in the freest country there is this painful yet unavoidable contradiction, that while we hold every person innocent until by lawful trial proved to be guilty, we must arrest a person in order to bring him to a penal trial; and, although by the law he is still considered innocent, he must be deprived of personal liberty until his trial can take place, which can not always follow instantly upon the arrest. To mitigate this harshness as much as possible, free nations guarantee the principle of bailing in all cases in which the loss of the bailed sum may be considered as a more serious evil than the possible punishment. (Lieber on Civil Liberty and Self-Government, 3d Ed. p. 67.)

Although the usual condition precedent to an arrest is a warrant duly issued by an authorized judicial officer upon oath or affirmation of witnesses, yet, as we have observed, there are many instances in which arrest may be made without a warrant. The reason is that the public necessity requires it. (*United States* v. *Bateman*, 278 Fed. 231; *Holker* v. *Hennessey*, 141 Mo. 527; *Getchell* v. *Page*, 103 Me. 387.)

The authority of private persons to arrest in certain cases (2 Hawkins, Pleas of the Crown, Chap. 12, Section 20), the right to break down doors to arrest a fleeing felon or to execute criminal process (2 Hawkins, Pleas of the Crown, Chap. 14, Section 1), and

the right to search both with and without warrant (*Robinson* v. *Richardson*, 13 Gray [Mass.], 454, 456), all alike are founded upon the theory of public necessity.

That the right of search without warrant is necessary under modern social conditions in many cases where it might not have been necessary a century ago is therefore both a powerful and a legitimate argument in favor of its reasonableness in such cases.

"Unreasonable Searches" in the Light of the Eighteenth Amendment.

In determining what is a reasonable search in the constitutional sense, due weight must be given to the fact that the Eighteenth Amendment expressly forbids the *transportation* of intoxicating liquor, and also provides that "the Congress * * * shall have power to enforce this article by appropriate legislation." We think it must be conceded that in these days of improved highways and motor transport the only effective legislation which Congress can enact for the enforcement of the specific prohibition against the transportation of liquor is such as will authorize the search of automobiles without warrant when probable cause exists. We do not contend that the Eighteenth Amendment must be enforced in such manner as to set aside the provisions of the Fourth, but we believe that what is reasonable in the constitutional sense must be interpreted in the light of the fact that another constitutional provision of equal weight and importance forbids the transportation of liquor. If the Eight-

eenth Amendment had forbidden only the manufacture and sale of intoxicating liquor, and the prohibition against transportation were contained only in an act of Congress passed for the purpose of carrying such amendment into effect, the question might be a materially different one.

The Circuit Court of Appeals for the Fourth Circuit in an opinion delivered February 8, 1924 (No. 2152) in the case of *Louis Milam* v. *The United States*, not yet reported, said:

> The constitutional expression "unreasonable searches" is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic, and legal conditions. The obligation to enforce the 18th Amendment is no less solemn than that to give effect to the 4th and 5th Amendments. The courts, are, therefore, under the duty of deciding what is an unreasonable search of motor cars in the light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes. Every constitutional or statutory provision must be construed with the purpose of giving effect, if possible, to every other constitutional and statutory provision, and in view of new conditions and circumstances in the progress of the nation and the state. *Downes* vs. *Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; *South Carolina* vs. *United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; *Elrod* vs. *Moss* (4th Circuit) 278 Fed. 123, 129; *An-*

gello vs. *United States* (2nd Circuit) 290 Fed. 671. In view of the difficulties of enforcing the mandate of the 18th Amendment and the statutes passed in pursuance of it, we can not shut our eyes to the fact known to everybody that the traffic in intoxicating liquors is carried on chiefly by professional criminals in motor cars. Robberies and other like crimes are committed, and criminals escape by their use. To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the courts in aid of the traffic outlawed by the Constitution. The argument in favor of stopping and searching without warrant motor cars in the effort to detect robbery and other crimes and to discover stolen goods is also very strong, but with that we are not now concerned. Objections to such searches made by officers with due courtesy and judgment generally come not from citizens interested in the observance of the law, but from criminals who invoke the Constitution as a means of concealment of crime.

In *United States* v. *Bateman*, 278 Fed. 231, 232, the court said:

> This proposition involves the interpretation of the 4th, 5th, and 18th Amendments to the Constitution of the United States. These amendments are of equal force and importance. It is plain that the 18th Amendment can not be enforced without legislation to enforce it, * * *.

In the light of these general principles, the Government contends that the search and seizure without warrant which was made in the case at bar was not unreasonable, because:

1. The defendants were operating an automobile upon a public highway.

2. The property seized was the legitimate object of search and seizure.

3. The defendants were committing a crime in the presence of the officers.

4. There was probable cause.

1.

The defendants were operating an automobile upon a public highway.

(a) The automobile afforded an immediate and effective means for escape, for removal of the object of the search, and for continued perpetration of the crime.

A factor of prime importance in determining the reasonableness of the search of these defendants without a warrant, is the fact that they were engaged at the time in operating an automobile upon a public highway. It is this circumstance which lends to the case at bar a stature which casts its shadow far beyond the boundaries of prohibition enforcement. That this is a liquor case is accidental. The principle which is to be established is fundamental.

> If the right here under investigation does or does not exist with regard to intoxicating liquor, it similarly does or does not exist with regard to narcotic drugs, weapons of crime and other instrumentalities used by the criminal classes in the warfare constantly maintained by them against organized society. The

> right to stop and search an automobile for liquor is no different from the right to stop and search an automobile to see whether or not it contains an infernal machine, opium or a bandit concealed beneath a laprobe, or, indeed, to discover whether or not the operator of the vehicle has in his possession the license card provided by the automobile statutes of the State. The question, therefore, must be removed from the atmosphere of the prohibition acts into one of the general extent of the police power under similar circumstances. (Stern and Gordon, J. J., in *Commonwealth* v. *Street and Street*, 3 Pa. District and County Reports, 783, 788, advance sheets of Dec. 18, 1923.) (Appendix, post p. 87.)

Nor will the consequences of the decision end with its application to the cases just referred to. It is conceivable that the possibilities of rapid transportation have not yet been exhausted and that inventive genius may furnish to succeeding generations engines now unknown which will far surpass in speed the present day motor car. The rule now made must apply with equal force to them. In its last analysis the question is whether all personal property, no matter what its character or form, must nevertheless be shrouded in the same inviolable privacy which has immemorially belonged to an Englishman's house, papers, and personal effects.

The invention, development, and general use of automobiles has probably produced a more profound effect upon social conditions than any other invention

of modern times. It has been productive of great benefits, but it has also presented to the officers charged with the enforcement of criminal laws the most serious challenge which they have ever been called upon to meet. In furnishing to criminals a means of rapid, safe, and private transportation over long distances, in affording swift, silent, and secret means of approach to and retreat from the place of crime, and in affording opportunity for the removal of stolen goods, or other fruits, evidences, or instruments of crime, it has far outdistanced the ingenuity and resources of police officers and seriously menaced the safety of our people in town and country alike.

The character and importance of the new problem which it has presented has been well described by the Supreme Court of Michigan in the recent case of *People* v. *Case*, 220 Mich. 379, 388, where that Court said:

> The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in battalions, until the slower, animal-drawn vehicles, with their easily noted individuality, are rare. Constructed as covered vehicles to standard form in immense quantities, and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious

question far deeper and broader than their use in so-called "bootlegging" or "rum running," which in itself is no small matter. While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfully utilized to facilitate commission of crime of all degrees, from those against morality, chastity and decency, to robbery, rape, burglary, and murder is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws. Whether search of and seizure from an automobile upon a highway or other public place without a search warrant is unreasonable is, in its final analysis, to be determined as a judicial question, in view of all the circumstances under which it is made.

We are not unmindful of the fact that heretofore no distinction has been drawn between various kinds of property which may be the subject of search. A man's clothing upon his person, his house, his papers, his office with its desks and files, and his postal communications sealed against inspection, have all been accorded the same protection, and no search of them has been permitted without a warrant, save that which is allowed immediately subsequent to a valid arrest. But the motor car is essentially different

from all of them in its mobility and in the fact that its ordinary use is entirely upon the public highway. It is *sui generis*. This fact, together with the necessity of vesting police officers with authority sufficient to enable them to engage on even terms the forces of disorder, justify the search of an automobile without a warrant when a search of a stationary or permanent habitation might, under otherwise identical circumstances, be wholly unreasonable.

This is the view which has been taken by those courts which seem to have given to the question the most careful consideration, and others though following a different course of reasoning, agree in the conclusion that automobiles may reasonably be searched without warrant.

> *Commonwealth* v. *Street and Street*, supra.
> *Louis Milam* v. *United States*, C. C. A. 4th Cir. No. 2152, decided Feb. 8, 1924, not yet reported.
> *People* v. *Case*, 220 Mich. 379, 383.
> *People* v. *De Cesare*, 220 Mich. 417.
> *People* v. *Margolis*, 220 Mich. 431.
> *United States* v. *Fenton*, 268 Fed. 221.
> *Commonwealth* v. *Rubin*, Pa. Superior Ct. Reported in Pittsburgh Legal Journal, Dec. 22, 1923, 921, 925.

It is a far cry from the "straw-built hut" which Lord Chatham in addressing Commons so eloquently described as beyond the approach of the King of England, to the modern high-powered motor car.

The case of *Amos* v. *United States*, 255 U. S. 313, relied upon by the defendants, is distinguishable

from the case at bar upon two grounds: (1) The record in that case discloses that the officers had no probable cause for the search, but appeared at the defendant's dwelling house and announced that they "had come to search the premises for violations of the Revenue Law." The search was purely exploratory. (2) The search was of a dwelling house and not an automobile.

The automobile in the instant case furnished an immediate means for escape, for removal of the object of the search, and for continued perpetration of the crime. These circumstances are of precisely the same character as those which at common law justified the arrest of felons or misdemeanants and their search without warrant to discover and seize the fruits, means or instruments of crime.

(b) The operation of an automobile upon a public highway is subject to such restrictions as the reasonable exercise of police power renders necessary.

"The streets belong to the public and are primarily for the use of the public in the ordinary way." (*Packard* v. *Banton*, 126 October Term, 1923, opinion delivered February 18, 1924.) The right of free passage to and fro along the highways was long recognized as in the nature of a natural right. The means of transportation were such that their use involved no danger to the public and occasioned no police regulation.

The right to operate an automobile, however, is quite different. As soon as the motor car appeared upon our highways it was recognized as a dangerous instrumentality, and thereupon the

public asserted its right to declare upon what conditions such machines might use the public streets. Whether the operation of automobiles upon the highways could be absolutely prohibited is perhaps a doubtful question. The Legislature of Prince Edward Island once enacted a statute (8 Edward VII, c. 13) entitled "An Act to Prohibit the Use of Motor Vehicles Upon the Public Highways of this Province," and the power of absolute prohibition there exercised was sustained in *In re William K. Rodgers*, 7 Eastern Law Repr. 212. The power has been doubted in *Walker* v. *Commonwealth*, 40 Pa. Superior Ct. 638, 642, and *Ex parte Snowden*, 12 Cal. App. 521, 526. It is clear, however, that their use upon certain streets or sections of a municipality may be forbidden. (Huddy on Automobiles, 5th Ed., p. 279, sec. 232.)

More common, however, are the statutes requiring that all automobiles be licensed, that they be equipped with horns, lights, and brakes in the manner prescribed by law, that they display license tags as a means of identification, that they be operated only by persons duly licensed who are required to carry upon their person and display upon demand their license to operate, and that they be operated subject to innumerable traffic regulations. The extensive exercise of the police power over this modern form of transportation is a clear recognition of the distinction which exists between the right of a pedestrian, or the driver of a horse, and the operator of a motor vehicle. And as the motor car may only be operated subject to the reasonable police regula-

tions, with which we are familiar, so also it is reasonable to provide by statute that it shall be operated only on the condition that it be subject to inspection and search whenever that is necessary to prevent it from becoming the instrument of criminals.

The very able discussion of this subject in *Commonwealth* v. *Street and Street*, which we have already cited, justifies the following extended quotation from that opinion (Appendix, *post*, p. 91):

> When the Constitution was adopted, the only subjects to which the 4th Amendment could apply were the persons of the individual citizens, their homes and their stores and warehouses. The rights of a person to privacy, to living in his home uninterrupted by official espionage, and to conducting the ordinary mercantile pursuits, were all antecedent in point of time to the organization of the Federal Government and to the formulation of its Constitution and laws. These rights were what the eighteenth century French philosophers would have called "natural rights," and as such they were peculiarly the subject of protection against the despotism of organized society and of its official representatives. Automobiles, viewed from the standpoint of personal property, are in an entirely different position. No one has a right to operate a motor vehicle upon the highways of the Commonwealth or of a municipality without a preliminary license granted by the State. No one needs such a license to live, to inhabit a home, or to transact

most lines of industry. There are, however, certain activities—for example, the sale of liquor in preprohibition days, the conducting of a pawnshop, and the like—which can not be carried on except by special permission, and as to which no one has a natural or inalienable right. The operation of a motor vehicle is in this class. The automobile, an invention of recent origin, is peculiarly the subject of governmental control, and were this not so, modern life and society would be hopelessly imperiled. If, therefore, it be true, as it is true, that a citizen has no right to use or to operate an automobile at all without permission from the Commonwealth, it must follow that one must obtain such permission *cum onere*, that is, subject to such control or limitations as the State may see fit to impose upon its licensees as conditions precedent to its enjoyment. Can any one doubt, for example, that in granting a license the State may constitutionally provide, as in fact it does provide, that every operator of a motor vehicle may be stopped at any time by an officer and made to exhibit his license card, and may even be compelled to write his name in the presence of the officer for the purpose of establishing his identity, or that any vehicle may be stopped by an officer for the purpose of inspecting it as to its equipment and operation and for securing "such other information as may be necessary?" Act of June 14, 1923, sec. 23, P. L. 718.

In short, the court is of opinion that the constitutional provision as to searches and

> seizures is quite distinguishable in its application to individuals, their habitations and business places on the one hand, and to motor vehicles on the other, because the rights in the one case are entirely independent of government, and in the other are derived wholly from the State. And while we are not prepared to say that there are no limitations of the power of the State even under such circumstances, we are of opinion that in construing the constitutional clause as to the unreasonableness of searches and seizures, such construction is properly to be varied when applied to inalienable rights over which the State has no control, and when applied to those industries and kinds of property (including, as above pointed out, automobiles) as to which no rights exist except in so far as the State may see fit to confer them.

We would not be understood as urging that a prohibition enforcement officer or any other officer of the law should be empowered to stop and search automobiles indiscriminately. The limit of our contention is this—that when an officer charged with the enforcement of law meets upon a public highway an automobile operated by an individual whom he has probable cause to believe is guilty of a serious crime, or is actually committing a continuing offense upon the highway and in the presence of the officer, he shall have the right to arrest such person without a warrant, and if there be like probable cause to believe that there is secreted upon his person, or in the automobile, the means or instruments of the crime, he

shall also have the power to search without warrant. If it be held that the Fourth Amendment prevents the investiture of officers with such authority, then this Amendment, originally designed as a bulwark for the protection of personal liberty, has become the shield and defense of criminals.

It may be urged that the authority sought to be exercised by the officers in this case is one of those insidious encroachments upon the right of personal security which the courts should always be alert to repel. The true situation is precisely the reverse. It is not a case where authority seeks to invade personal security, *but on the contrary it is one where the extension of security to a novel form of property threatens to undermine authority.* By claiming for the automobile the same immunity which properly belongs to a private dwelling, the contention of the defendants bids fair to disturb the even balance so long maintained between the opposing forces of liberty and authority and to tip the scales permanently in favor of disorder and lawlessness.

2.

The property seized was the legitimate object of search and seizure.

Property which may be the object of search and seizure by police officers is of two general classes. The first is that in which the public has no legal interest and which is valuable to the state *only* as evidence of crime or of the intent to commit crime. A search for such property is unlawful and unreason-

able under any and all circumstances, either with or without warrant, and it is beyond the power of Congress to legalize it. (*Cooley, Constitutional Limitations*, 7th Ed. 431.) The second is that in which the public is presumed to have a legal interest because it is more than mere evidence of crime, it is the fruit of the crime or the means or instrumentality by which it is committed. It is part of the *corpus delicti*. Such property is the legitimate object of search and seizure. Property of this class includes stolen goods, weapons used in committing assaults, burglar's tools, forged or counterfeit notes, implements of counterfeiting, implements of gambling, excisable articles, game and fish illegally killed or caught, obscene books and pictures, explosives and dangerous chemicals, and intoxicating liquor illegally possessed and the implements for its illicit manufacture. (*Boyd* v. *United States*, 116 U. S. 616, 623, 624.)

The decision in most of the leading cases involving the right of search and seizure has turned upon the nature of the property to be seized.

In *Entick* v. *Carrington*, 19 How. St. Tr. 1030, the object of the search was papers which might tend to prove the authorship of certain issues of The Monitor or British Freeholder, which were said to be libelous. Counsel for Entick pointed out in his argument that this was not a search for the subject of the alleged crime but a search for evidence only. He argued: "It is the publishing of a libel which is the crime, and not having it locked up in a private drawer in a man's

study" (p. 1038). It was urged by counsel for the defendant that copies of the offending publication were no different from stolen goods which had always been recognized as the legitimate object of a search. But Lord Camden, delivering the judgment of the court, sustaining the position of the plaintiff said (p. 1066):

> I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle him to restitution. In the other, the party's own property is seized before and without conviction. * * *

In the cases of *Leach* v. *Money*, 19 How. St. Tr. 1002, and *Wilkes* v. *Wood*, Id. 1154, the object of the search was evidence of the authorship of certain issues of The North Briton, which were said to be libelous, and a like conclusion was reached by the court in those cases.

In *Boyd* v. *United States*, 116 U. S. 616, an action was brought for the forfeiture of 35 cases of plate glass alleged to have been illegally imported. It became important to the Government to offer in evidence an invoice for 29 cases of plate glass previously imported and not the subject of the pending libel. The District Court made an order for the production of the invoice under Section 5 of the Act of June 22, 1874, which authorized the making of orders for the production of any "business book, invoice, or paper belonging to, or under the control of, the defendant

or claimant, [which] will tend to prove any allegation made by the United States." The compulsory production of this evidence was declared by this Court to be in violation of the Fourth and Fifth Amendments. Referring to the distinction between the two classes of property which we have pointed out, Mr. Justice Bradley said (p. 623):

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * (P. 624:) So also the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. *Commonwealth* v. *Dana*, 2 Metc. (Mass.) 329. Many other things of this character might be enumerated.

> * * * In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment.

In *Weeks* v. *United States*, 232 U. S. 383, the defendant was charged with having used the mails to conduct a lottery. Certain local police officers had made a search of his room, in his absence, without his consent and without a warrant, and had obtained certain lottery tickets and statements relating thereto. A short time afterwards on the same day the United States Marshal made a similar search of his property and obtained a number of letters which tended to incriminate him. He objected at the trial to the introduction of all of these papers in evidence, which objection was overruled by the trial court and its action in so doing was assigned as error in this Court. The opinion of Mr. Justice Day dealt almost exclusively with the letters seized by the United States Marshal. These letters, which were not the subject of the offense nor the means or instrumentality by which it was committed, were held to have been taken in violation of his constitutional rights. As to the lottery tickets themselves, the defendant's objection to their use was not well founded, because they had not been obtained through an unlawful search made by any officer of the United States but by local offi-

cers, and under the decisions of this Court were properly admitted. As the lottery tickets were themselves the instruments of the crime for which the defendant was tried, there is no doubt that they were the legitimate object of search and seizure, though the court had no occasion to determine the point.

In *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, a clean sweep was made of the offices of Frederick W. Silverthorne and his father, and all books, papers, and documents found there were delivered to the District Attorney. He selected such as he thought were valuable as evidence against the defendants in their pending criminal trial, made photographic copies of them, and returned the originals to the defendants. Subsequently it was sought to compel the production of the originals as evidence upon the criminal trial. The nature of the papers found does not appear from the opinion of the court, but it is likely from the nature of the search and the property seized that the letters and papers, whose production was demanded, were of an evidentiary character only.

In *Gouled* v. *United States*, 255 U. S. 298, papers which were of an evidentiary character only, were obtained from the defendant's office by stealth and later used in evidence against him upon a criminal trial. The case came to this court upon a certificate from the Circuit Court of Appeals which certified six questions, but did not set out the nature and character of the papers seized. Mr. Justice Clarke, speaking

for this court, based his opinion, however, upon the assumption that they were papers of an evidentiary character only. He said at page 309:

> Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks cases, supra, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a cirminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

The reason for the distinction between these two classes of property arises out of the immunity from self-incrimination guaranteed by the Fifth Amendment. When stolen goods are searched for and seized the primary right of seizure arises from the fact that the goods are stolen. Their use as evidence against the defendant is considered only incidental. In the case of other property, however, which has evidentiary value only and which is seized for the

sole purpose of using it as evidence, the violation of the immunity from self-incrimination is clear and unalloyed. "In this regard the Fourth and Fifth Amendments run almost into each other." (*Boyd* v. *United States*, 116 U. S. 616, 630.)

Papers so seldom constitute the means or instrumentalities for the commission of crime, and therefore so seldom become the legitimate object of search and seizure, that it has been supposed that a peculiar sanctity attaches to them. That this is not the case, however, was clearly pointed out by Mr. Justice Clarke in *Gouled* v. *United States*, 255 U. S. 298, 309, where he said:

> There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, *Langdon* v. *People*, 133 Ill. 382, and lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth* v. *Dana*, 2 Metc. 329, and we can not doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

The distinction between property which is and that which is not the legitimate object of search and seizure is recognized in:

City of Sioux Falls v. *Walser*, 45 S. Dak. 417.
People v. *Bowen*, 198 N. Y. Sup. 306.
United States v. *Welsh*, 247 Fed. 239.
United States v. *McBride*, 287 Fed. 214.
State v. *Pauley*, 192 N. W. (N. D.) 91.
Commonwealth v. *Klein and Goodstein*, 81 Pa. Sup. Ct. 551.
Commonwealth v. *Schwartz*, Pa. Superior Ct., Pittsburgh Legal Journal, advance sheets, Dec. 22, 1923, 927, 931.
State v. *Krinski*, 78 Vt. 162.
State v. *Simmons*, 183 N. C. 684.
State v. *Chuchola*, 120 Atl. (Del.) 212.
Haywood v. *United States*, 268 Fed. 795.

It is quite clear that the *Boyd*, *Weeks*, *Silverthorne*, and *Gouled* cases, so strongly relied upon by the plaintiffs in error in the case at bar, have no application here, because the property here searched for and seized belongs to that class which is clearly the legitimate object of search and seizure.

Section 25 of the National Prohibition Act provides:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.

Section 26 provides for the seizure and forfeiture of any vehicle used for the unlawful transportation of liquor.

Accordingly, both the liquor and the automobile were the proper objects of search and seizure. The moment their illegal possession or transportation began they at once became the property of the United States. The officers searching for and seizing them did not search and seize property of the person in illegal possession but merely took possession of that in which the United States had a legitimate and proper interest. See *O'Connor* v. *United States*, 281 Fed. 396; *United States* v. *Fenton*, 268 Fed. 221; *United States* v. *O'Dowd*, 273 Fed. 600; *United States* v. *Hilsinger*, 284 Fed. 585; *United States* v. *Bateman*, 278 Fed. 231; *United States* v. *Snyder*, 278 Fed. 650; *People* v. *Case*, 220 Mich. 379.

3.

The defendants were engaged in committing a crime in the presence of the officers.

The arrest and search of the defendants without a warrant is further justified by the fact that they were engaged at the time in committing a crime in the presence of the officers. We have already pointed out that such cases constitute an exception to the general rule which requires a previous warrant. The reasons are two-fold: (1) the officer's knowledge and his official responsibility are a substitute for the sanction of the oath or affirmation of other witnesses, and (2) the necessities of the case require it.

It will be urged, however, that the crime can not be deemed to be committed in the presence of the officer unless he has positive knowledge of it by the

use of his senses of sight, hearing, or smell. Authority in support of this contention has been cited in the brief for the Plaintiffs-in-Error. We think this is clearly erroneous. Such knowledge is not required in many cases of him who makes the oath or affirmation upon which a warrant is issued, and there is no logical reason why it should be required of an officer.

In *Ex parte Morrill*, 35 Fed. 261, 267, it is said:

> A crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime.

In *United States* v. *Hilsinger*, 284 Fed. 585, 589, it was said:

> The question whether the officer must have direct knowledge of the contents of the package in transit is an interesting one. He never, by looking at the outside of a box, barrel, or bottle, can actually know what is inside of it. He may have good cause to believe from the label or from the looks of it, from reliable information, or from the situation and circumstances, but he never can know what is inside of it, and if there must be a search warrant issued upon direct evidence of the alco-

> holic contents of the vessel, first-handed evidence, it can never be seized, or practically so. A similar question has often arisen with regard to the carrying of concealed weapons, whether the officer must have first-hand knowledge that one has a concealed weapon before he can arrest him for carrying it. It has been held that an officer has a right, upon reasonable and probable cause, upon such information as would lead one having due regard to the rights of others to act, to arrest, and search for carrying concealed weapons. *Ballard* v. *State*, 43 Ohio St. 341.

In *Green* v. *United States*, 289 Fed. 236, 238, the court said:

> It has further been held that it is not an unreasonable search for an officer, charged with the enforcement of the law, to arrest on the public highway a person who, as in the case at bar, previous information gives him reasonable grounds to believe has committed and is committing a felony. Such was the common law at the time the Constitution was adopted, and the Fourth Amendment made no change therein.

And in *United States* v. *McBride*, 287 Fed. 214, 218, the court said:

> It seems to me, if an officer has reason to believe an offense is then being committed, he may search without having a warrant, just as he may arrest without one when the offense has been committed in his presence. If he may search without a warrant, it is

manifest he may also seize the same things that he could if he held the warrant.

The analogy between arresting and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case.

To the same effect are:

United States v. *Fenton*, 268 Fed. 221.
Lambert v. *United States*, 282 Fed. 413.

In short the question whether a crime is being committed in the presence of the officer is essentially one of probable cause, not one of absolute certainty. Wherever the facts within the knowledge of the officer are such as to warrant a reasonable person in concluding that a crime is being committed, then it is being committed in his presence, within legal contemplation, and arrest and search without warrant are not unreasonable. In the case at bar all of the facts from which the officers drew the inference that the defendants were engaged at the time in transportation of liquor, were facts within their own observation and knowledge, and those facts, as we shall show hereafter in discussing "probable cause," were such as to render their action reasonable.

4.

There was probable cause for the search.

Probable cause is a condition precedent to every lawful search. It is not every idle rumor, unreasonable suspicion, or ill-founded belief in a person's guilt which will justify a search of his person or prop-

erty. There must be a concurrence of an actual belief of guilt with reasonable grounds for entertaining such belief. The source may be either personal observation or information obtained from reliable and trustworthy persons, and the reasonable grounds should consist of such facts as would lead a reasonable man to believe that a crime had been committed and that the person to be searched had committed it.

> Probable cause which will justify an arrest is reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense of which he is suspected. (*Green* v. *United States*, 289 Fed. 236, 238; *United States* v. *Snyder*, 278 Fed. 650, 658.)
>
> Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. (*Burt* v. *Smith*, 181 N. Y., 1, 5.)
>
> Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief. (*Runo* v. *Williams*, 162 Cal. 444, 451.)

Probable cause is not actual and positive personal knowledge. If such positive knowledge were required in advance of the issuance of a warrant, or prior to an arrest and search without warrant, few arrests could be made. Probable cause is no more than a fair inference from known facts.

In the case of *State* v. *Mullen*, 63 Montana 50, 58, the Court said:

> It is the contention of counsel for the defendant that from the very nature of the case the sheriff did not know, and could not know, that the demijohn contained intoxicating liquor at the time the articles were seized or until after seizure and an examination of the contents of the container; hence the seizure was unlawful. As we understand this contention, it is that to authorize a seizure under section 9 the officer must have actual, personal knowledge that the acts of the alleged offender constitute a violation of the liquor laws, and, if counsel are correct, then the arrest and seizure provision of section 9 becomes a dead letter; for under practically any conceivable circumstances it would be impossible for the officer to have such knowledge. * * *
>
> The utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue. In other words, if the circumstances are such that the officer could properly secure a warrant of arrest, he may arrest without a warrant if the offense which the circumstances tend to establish was committed in his presence.

Furthermore, probable cause does not depend upon what the actual fact in the case may be. Nor upon whether the person arrested or searched is finally proven guilty or innocent. Accordingly, circumstances which do not amount to probable cause for

a search can not be strengthened by what is actually found, and, conversely, if there be probable cause, it is not removed nor avoided by the fact that nothing is found. (*Mundal* v. *Minneapolis & St. Louis R. R. Co.*, 92 Minn. 26, 30; *Michael* v. *Matson*, 81 Kans. 360.) Although there are authorities in the lower Federal courts which hold that the actual finding of liquor will justify a search without probable cause (*United States* v. *Bateman*, 278 Fed. 231, 235), we do not rely upon them in this case. It is not our contention that this search was rendered reasonable because sixty-eight quarts of liquor were found in the defendants' automobile, but we do rely upon the facts of which the officers had knowledge at the time the search was made.

A case quite similar in its facts is that of *Green* v. *United States*, 289 Fed. 236. There the defendants had for some time been under surveillance as suspected dealers in narcotic drugs. One day they were seen carrying a grip and entering a drug store, which was a notorious rendezvous for peddlers of narcotics, the proprietor of which was then under indictment. They were arrested and a search of their grip was made without a warrant, and it was held that there was probable cause for the search and that the same was not unreasonable.

As summarized in the Statement of Facts at the opening of this brief, they were as follows: The officers knew the business in which the defendants were engaged. They knew that that business was the illegal transportation of intoxicating liquor to Grand

Rapids and its sale in that city. They knew that the defendants used an Oldsmobile roadster in the conduct of that business. They knew that the highway between Detroit and Grand Rapids was habitually used by violators of the National Prohibition Act as a route over which to transport liquor. And they knew that the defendants at the time of the arrest and search were traveling in that automobile from the direction of Canada, a well-known source of supply, toward Grand Rapids, which was the defendants' market. They had previously bargained with these defendants for the purchase of intoxicating liquor, and upon another occasion had followed their automobile along the same highway.

There was no doubt or uncertainty as to the identity of the defendants. Both Cronenwett and Scully had met them personally and had talked with them, knew that they were "bootleggers," had seen their automobile and seen them engaged in its operation, and on the day of the search, when the defendants passed the officers the latter were absolutely certain of their identity. Nor do we think there was any reasonable doubt that the defendants at the time were engaged in plying their trade. Had any reasonably cautious man known the same facts, he would have inferred that these men when they passed the officers on this highway were bringing with them a cargo of contraband liquor. The question may arise as to why the officers did not turn about immediately and follow the defendants if they were certain of their guilt. This is readily explained, however, by the

obvious fact that if the officers had so turned it would probably have given the defendants reason to believe that they were being pursued and they would have put on full speed ahead for the purpose of escape.

We respectfully submit that under all the circumstances the officers had probable cause for making the arrest and search.

III.

The liquor which was seized was properly admitted in evidence.

Under the circumstances of this case the admissibility of the liquor as evidence against the defendants at their trial depends entirely upon whether it was lawfully seized. If, as the Government contends, it was obtained without violation of the constitutional rights of the defendants, it was clearly admissible to prove their guilt; otherwise, under the decisions of this Court it was inadmissible.

Boyd v. *United States*, 116 U. S. 616.
Weeks v. *United States*, 232 U. S. 383.
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385.
Gouled v. *United States*, 255 U. S. 298.

IV.

Assuming that the search was unlawful as to defendant Carroll, it was not as to defendant Kiro.

Assuming that the search was unlawful as to the defendant Carroll it was not unlawful as to the defendant Kiro. It is not denied that both defend-

ants were engaged in transporting liquor. Both Carroll and Kiro in their petitions to return the liquor and the automobile which was seized state that the liquor and automobile belonged to Carroll only. (R. 3–5.) The search, therefore, if unlawful as to Carroll violated no constitutional rights of Kiro. *Wilson* v. *United States* (1910), 221 U. S. 361; *Dreier* v. *United States* (1910), 221 U. S. 394; *Haywood* v. *United States* (1920), 268 Fed. 795.

In the *Haywood* case search and seizure was made of the offices of the I. W. W. The property seized was offered in evidence against a member of the association and was held to have been properly admitted. The court, on p. 803, says:

> Consider, next, the person whose privacy is invaded. If it be granted that the home of Burglar Smith, in which he has concealed the stolen goods and the implements of his crime, can not lawfully be searched and the property seized, except under a warrant, * * *, it does not follow that Burglar Smith will be heard to complain that the Fourth Amendment has been violated by forcible and unlawful breaking into the home of Burglar Jones and the seizure there of the property and implements of crime of Burglar Smith.

The Fourth Amendment provides that:

> The right of the people to be secure in *their* persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *. [Italics ours.]

Kiro's security in *his* effects was not violated.

V.

There was no error in admitting in evidence conversation between defendants and Government agents prior to arrest.

The objection that the admission of the testimony concerning the conversation between the defendants and the Government agents on September 29, 1921, constituted error is groundless. That evidence was offered to show one of the grounds which made the search and arrest of the defendants reasonable. An objection that evidence is incompetent (R. 8) without stating specific reasons for objection is equal to no objection at all. See *Sparf* v. *United States* (1894), 156 U. S. 51, 57. Also, if the admission of said testimony was error, it was harmless error, because defendants failed to object to the same matter being testified to by another Government witness. (R. 11.)

Summarizing the contentions of the Government we respectfully submit:

1. That the search which was made of the defendants' automobile without a warrant was authorized by the provisions of section 26 of the National Prohibition Act.

2. That the search and seizure without a warrant was not unreasonable nor in violation of the constitutional rights of the defendants because—

(*a*) They were engaged at the time in operating an automobile upon a public highway. The automobile afforded an immediate and effective means for escape, for removal of the object of the search,

and for continued perpetration of the crime in which they were engaged.

(*b*) The property searched for and seized was the legitimate object of a reasonable search and seizure.

(*c*) They were engaged at the time of the search in committing a crime in the presence of the officers, and

(*d*) The facts and circumstances known to the officers furnished probable cause for the belief which the officers entertained that intoxicating liquor was being unlawfully transported by the defendants.

We respectfully submit that with the advent of the motor car, property has taken a form which has created a necessity for search and seizure without warrant which has not heretofore existed. Notwithstanding the fact that no distinction has heretofore been made between the subjects of search, whether houses, papers, or other possessions, this new form of property requires that a distinction be made. If there be probable cause, and the object of the search be a legitimate one, the search without warrant of an automobile which is being operated upon a public highway is a reasonable and lawful search, even though that of a house, hotel, apartment, office, or other fixed property might under similar circumstances be unreasonable and unlawful.

CONCLUSION.

The reasonableness of a search depends upon whether the public interest at the time is such as to justify the invasion of the citizen's privacy for the public good. The privacy of every citizen is necessarily

subject in this as in all respects to such contribution to the public safety as the common weal demands. If, having regard to the public necessities, the sacrifice of privacy which the citizen is called upon to make is disproportionate to the public good to be served, then it is "unreasonable." If, however, such sacrifice is reasonably necessary to the safety of the state, it is reasonable. Upon this theory the examination of an incoming passenger's baggage and even the humiliating search of his clothes and person is at times justified, for without it there could be no reasonable administration of the customs laws. We concede that in thus determining what is reasonable, doubts should be resolved in favor of the citizen. But such consideration should not be carried to the indefensible extent of imperiling the safety of the State, as the unchecked increase of crime does certainly threaten.

In determining at any given time or with reference to any given subject what is reasonable, having fair regard both to the safety of the State and the privacy of the citizen, great weight should be primarily attached by the judiciary to the opinion of the legislative branch of the Government, and as we have shown ante (pp. 6–20) Congress has recognized the necessity, if prohibition is to be effective, that vehicles on public highways should be searched, where there is any reasonable ground for believing that they are operated in violation of law. We do not contend that the declaration of the legislative branch of the Government is conclusive upon the

judiciary. Upon the latter finally rests the solemn duty of protecting the citizen in his fundamental rights, but as the question of reasonableness primarily turns upon considerations of common experience, great weight should be given to the legislative direction.

The judiciary may well also have regard to the judgment of the Executive Branch of the Government unless it is plain that it is animated, as it was in the case of the General Warrants agitation in England, by political considerations of a tyrannical character. Certainly when the Executive Branch of the Government and the legislative department are in accord that the crime wave can not be ended if the automobile is allowed to use the highway without ample opportunity to prevent its unlawful use, then the judicial department of the Government should be slow to decide that that is unreasonable which two coordinate branches of the Government have regarded as reasonable.

Nothing is more striking or portentous than the growth in the last quarter of a century in crime. Once holdups by highwaymen and bandits were rare even in the unsettled portions of the country. To-day they are commonplaces in our greatest and most populous cities. Once murder was so rare as to be regarded abnormal. To-day in our largest cities hardly a day passes that there is not an atrocious murder, while banditry is so common that it is literally true that in our large cities the days of Dick Turpin and Jack Sheppard have returned. Beyond the possibility of dispute this is largely due to the use of the

public highway by the automobile and to the automatic pistol. If our definition of the word "reasonable" is correct, then can it be questioned that in this matter, if life and property are to be made safe in the large cities of our country, the public interest outweighs that incidental sacrifice of privacy which the search of an automobile—when there is reasonable ground for suspecting that it is being used in furtherance of crime—may entail. If a policeman in New York City immediately after he has heard a pistol shot sees a couple of known thugs and gunmen in a motor car running it at the rate of sixty miles an hour, is he obliged to go to a magistrate and get a warrant to stop the car and to detain the gunmen?

Respectfully,

JAMES M. BECK,
Solicitor General.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

MARCH, 1924.

APPENDIX A.

CITY OF NEW YORK,
POLICE DEPARTMENT,
February 25, 1924.

Hon. JAMES M. BECK,
Solicitor General, Washington, D. C.

MY DEAR MR. BECK:

Your inquiry, under date of February 15th, was duly received, and your observations regarding the difficulty of the pursuit, detection, and arrest of criminals, caused by the frequent use of high-powered automobiles in the commission of crime, is intensely interesting.

For some years past the frequent use of high-powered motor vehicles as a means of escape from the place where a crime is committed, as well as an efficient means of getting away with loot, has been of great concern to this Department and, indeed, to police authorities throughout the World. The modern high-power motor vehicle furnishes the desperate criminal with facilities by the use of which he has a great advantage over police authorities and peace officers charged with the enforcement of the criminal law. This fact in the criminal's favor and the progressive use of motor vehicles in the commission of crime was recognized by me several years ago as an important factor concerning the enforcement of law and order.

In March of last year I called the attention of our Legislature to the imperative necessity of incorporating in our Penal Law proper provision to cope with this problem and submitted a proposed amendment to the law making the crime of robbery by the use of a motor vehicle robbery in the "first degree." This was enacted into law in this State by Chapter 504, Laws of 1923. But it is also imperative that our criminal procedure should be amended to provide peace officers with proper authority to stop such motor vehicles for the identification of drivers and passengers and an examination for property that may be acquired in the commission of crime. The use of such motor vehicles by criminals armed with that popular weapon of murder and robbery, the automatic pistol, is a public menace, which demands that our ancient law be so amended as to cope with these modern facilities that are laid hold of by desperate criminals in their unlawful enterprises.

I am pleased to know that the obvious necessity for a proper amendment to our criminal law and procedure to cope with modern inventions, such as the automatic pistol and high-power automobile, has been recognized by the Federal Government, and trust that your efforts in this behalf will meet with merited success.

With assurances of my great personal regards, I am,

Very truly yours,

R. E. ENRIGHT,
Police Commissioner.

89023—24——6

Appendix B.

Commonwealth v. *Street and Street; Commonwealth* v. *Cella.*

Petition to enjoin use in evidence of property seized in violation of defendants' constitutional rights. Q. S. Phila. Co., Sept. Sess., 1923, Nos. 690, 691, and 631.

Joseph K. Willing, Charles E. Fox, Assistant District Attorneys, and Samuel P. Rotan, District Attorney, for Commonwealth.

Henry M. Stevenson, for defendants.

Stern and Gordon, JJ., Dec. 10, 1923: On Aug. 25, 1923, at about half-past one in the morning, Ernest Street, Alvin Street, and Louis L. Cella, defendants in the above cases, were each driving a five-ton truck on the Roosevelt Boulevard, in Philadelphia. Three detectives, having received information that trucks of beer were going over the Boulevard to New York, stationed themselves at Castor Road and stopped the defendants' vehicles at that point. They announced to the drivers that there were officers of the law and asked them what they had on their trucks. Ernest Street and Louis E. Cella said that they did not know; Alvin Street said, "I've got beer." Thereupon the defendants were requested to open the trucks, which they did, and it was discovered that each truck contained a load of sixty half-barrels of beer, later upon analysis found to contain from 2.25 to 2.35 per cent by volume of alcohol.

The testimony disclosed that at and immediately before the seizure and opening of the trucks the defendants had not been violating any of the traffic

regulations or otherwise committing any apparent breach of the peace, that the trucks were all closed in such a manner that the contents were not visible, neither was there any odor of beer discernible until after the search had proceeded. It is also a fact admitted by the officers that they had no warrant of arrest or of search.

The defendants were arrested and indicted for the transportation and illegal possession of intoxicating liquor. When the cases were called for trial counsel for defendants presented petitions in each of the cases, alleging that the searches and seizures of the trucks and their contents were in violation of the Constitution and of the acts of assembly of the State of Pennsylvania, and praying that the court restrain the district attorney, the director of public safety, and their assistants, officers, and detectives, from offering at the trial any of the evidence or articles seized as aforesaid, and from testifying to any facts learned by them at the time of said searches and seizures or in consequence thereof. The trial judge continued the trial of the cases until the prayer of the petitioners should be disposed of as a preliminary proceeding, and it is these petitions which are now before the court for consideration.

Counsel for the defendants conceded at the bar of the court in argument that the petition must fall as to the defendant, Alvin Street, because, he having stated that he had beer on his truck, this admission in itself amounted to such reasonable and probable cause of belief that the law was being violated as to justify the officers in seizing and searching the truck. On the other hand, it is apparently conceded by the Commonwealth that, as to the two other defendants, the mere fact that when asked by the

officers whether they would open the trucks, they said, "yes," and proceeded to do so, does not constitute such a voluntary acquiescence on their part as to amount to a waiver of their constitutional rights. This concession on the part of the Commonwealth is justified by the established principle that where an officer politely, decently, and without physical threat has assumed to act in his official capacity, a peaceful citizen who does not forcibly resist the action, even though he knows the officer to be exceeding his authority, is held not to have acquiesced in the unlawful search or arrest: United States *v.* Slusser, 270 Fed. Repr. 818; United States *v.* Rembert, 284 Fed. Repr. 996, and cases there cited.

It is to be noted that the defendants' petitions do not ask that the seized liquor be returned. Defendants admit that, whether the search and seizure were lawful or unlawful, the liquor itself is contraband and the defendants have no property rights therein. The beer, by virtue of the National Prohibition Act (41 Stat. 305, Act of Oct. 28, 1919, ch. 85, title II, § 25) and the corresponding act in our own State (Act of March 27, 1923, § 11*a*, P. L. 34), was forfeited the moment the defendants embarked upon the unlawful transportation, and, therefore, under no possible view of the case, have they any right to a return of the property seized. Moreover, there is no law requiring or justifying the return of property to any one whose possession of it constitutes a crime or whose use of it is only for the purpose of committing a crime; Rosanski *v.* State, 140 N. E. Repr. (Ohio) 370; People *v.* Case, 190 N. W. Repr. (Mich.) 289; People *v.* Bowen, 198 N. Y. Supp. 306; State *v.* Chuchola, 120 Atl. Repr. (Del.) 212; United

States *v.* Kaplan, 286 Fed. Repr. 963; United States *v.* Fenton, 268 Fed. Repr. 221; United States *v.* O'Dowd, 273 Fed. Repr. 600; United States *v.* Dziadus, 289 Fed. Repr. 837; Pasch *v.* People, 209 Pac. Repr. (Colo.) 639; United States *v.* Alexander, 278 Fed. Repr. 308.

The Commonwealth, in its answers to the petitions, raises the question of the jurisdiction of the court, contending that the prayer is for an order in the nature of an injunction which can be made only by a court of equity. There exists, however, abundant authority for the proposition that the Court of Quarter Sessions which is charged with the trail of the cause can determine, and indeed alone can determine, the relevancy of the evidence presented for its consideration, can control the disposition of documents and other physical articles submitted or proposed to be submitted as evidence, and can direct the district attorney and other officers and witnesses presented by the Commonwealth with regard to testimony proposed to be offered by them. The property in question being seized under the claim of judicial process and thus brought under the control of the trial court is beyond reach of a writ of replevin or other remedy. Applications of the kind here involved have generally been treated as incidental to criminal prosecutions pending in the court to which they are made: Burdeau *v.* McDowell, 256 U. S. 465; United States *v.* Hee, 219 Fed. Repr. 1019; In re Chin K. Shue, 199 Fed. Repr. 282; United States *v.* Maresca, 266 Fed. Repr. 713; United States *v.* McHie, 194 Fed. Repr. 894; United States *v.* Friedberg, 233 Fed. Repr. 313; In re Weinstein, 271 Fed. Repr. 5; Weinstein *v.* Attorney General, 271 Fed. Repr. 673; United States *v.* Mills, 185 Fed. Repr. 318; Wise *v.*

Henkel, 220 U. S. 556; 1 Bishop on Criminal Procedure §210; Rex *v.* Barnett, 3 C. & P. 600; Rex *v.* Kinsey, 7 C. & P. 447. The state courts similarly offer a continuous course of precedents for the present practice.

The decision of these preliminary matters thus brings us to the main questions presented by the petitions, which we conceive to be three in number, namely:

1. Have police officers authority, either under legislative enactment or the principles of the common law, to make a search and seizure such as that which occurred in the present causes?

2. Assuming that such authority exists, is it valid in view of the constitutional provision regulating searches and seizures?

3. If the searches and seizures now in question were unconstitutional and, therefore, invalid, is the evidence obtained by the officers as a result thereof nevertheless admissible at the trial of the defendants?

1. The statutory authority justifying the action of the officers is that contained in the National Prohibition Act (41 Stat. 305, Act of Oct. 28, 1919, ch. 85, title II, § 26), which provides as follows: "When the commissioner, his assistants, inspectors or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air or water

craft, or any other conveyance, and shall arrest any person in charge thereof." And the state act of March 27, 1923, § 9, P. L. 34, which provides: "When any officer shall discover any person in the act of transporting, in violation of this act, intoxicating liquor in any wagon, buggy, motor-vehicle, water or air craft, or other vehicle or receptacle, or otherwise, it shall be his duty to seize any and all intoxicating liquor and container found therein, being transported contrary to law, with or without a warrant. Whenever intoxicating liquor, transported or possessed illegally, shall be so seized by any officer, he shall take possession of the vehicle and team, or motor-vehicle, boat, air or water craft, or any other conveyance or receptacle, and shall arrest any person in charge thereof."

It will thus be seen that the Pennsylvania statute expressly gives the right to an officer to make a seizure "with or without a warrant" if he shall "discover" the person in the act of transporting intoxicating liquor. The word "discover," which also appears in the Federal act, has been made the subject of extended discussion respecting its connotation as thus employed in this legislation. Some courts have taken the ground that by "discover" is meant that the officer without any preliminary manual action must actually see, hear, or smell the liquor. This has resulted in a fineness of interpretation which makes the subject amusing. A bottle of liquor may be so inclosed as to make visual evidence of its existence impossible, and thus an officer would be denied the right of further examination in order to enforce the law and apprehend the lawbreaker. It is argued that if the liquor be so concealed in the passing automobile as to render it invisible, the officer

is powerless to act, whereas if the cork of a bottle protrudes, or if a blanket be so carelessly placed over the contents of the vehicle as to allow a peep at the articles which it is intended to conceal, the officer is thereby afforded such reasonable and probable cause as to justify his further action. It is not believed that the practical and common-sense nature of our people and of the law which that nature has through so many centuries developed will permit of such academic and fine-spun distinctions. As a matter of fact, the word "discover" has no such limited meaning. As defined in Webster's International Dictionary, it means to "uncover; to remove or lift (any covering); to lay open to view; to reveal; to make known; to show (what has been secret, unseen, or unknown); to manifest; to show; exhibit; betray; to explore; examine; reconnoiter; to obtain for the first time sight or knowledge of, as of a thing existing already, but not perceived or known; to find out; to ascertain; espy; detect; descry." In other words, the essential nature of the word "discover" involves, not a facile observation, but rather a detection as the result of preliminary measures by way of uncovering, revealing, and laying open to view. The very etymological analysis of the word would suggest an uncovering rather than a mere observation of something already exposed to the action of the senses.

We readily conclude, therefore, that both the Federal and state acts do not intend by the use of the word "discover" to limit the right of the officer to proceed only upon the evidence of the optic, auditory or olfactory nerves, but, on the contrary, were intended to and do give such right when a "discovery" is made as the result of an "uncovering," "reveal-

ing" or "exploring." Furthermore, the state act expressly provides (section 8) that "the right to a search warrant, as provided for in this section, shall be in addition to all other rights of search and seizure now existing under law," and at common law officers have had the right from time immemorial to conduct reasonable searches and seizures without warrant.

We, therefore, have no hesitation in concluding that officers are vested with authority to make a search and seizure of the kind here in question unless prohibited by the Constitution of the State.

2. This, therefore, brings us to the second question in the case: Did the search and seizure here involved violate the constitutional rights of the defendants? If the state act be thus interpreted as conferring authority upon the officers of the law to the extent exercised in the present instance, is it unconstitutional, and does the Constitution also bar the common law rights of search and seizure above referred to? Incidentally, it may be noted that the 4th Amendment to the Federal Constitution does not apply to state laws.

Article I, section 8, of our State Constitution provides that "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

It is elementary that search warrants and warrants of arrest are not required in all cases. Arrests and searches and seizures without preliminary affidavits and warrants have long existed in practice. The only limitation prescribed in the Constitution is

that such searches and seizures shall not be "unreasonable," and, therefore, the only question involved is whether the search and seizure here complained of was or was not "unreasonable."

We are not unaware of the importance and gravity of the question thus presented; on the contrary, we are impressed by the fact that it is but a phase of that conflict which has existed throughout history between the desire, on the one hand, for a strong and efficient police system, insuring safety to the citizens, and on the other, for a proper protection to those individual rights and liberties so dearly prized by the Anglo-Saxon people above all other races and nations. The constitutional right here invoked probably had its origin in the doctrine of the famous Wilkes Case (19 Howell's State Trials, 981), and that of Entick *v.* Carrington (19 Howell's State Trials, 1029), decided by Lord Camden in 1763 and 1765, respectively. The 4th Amendment, as written into the Federal Constitution, followed somewhat similar provisions in the Constitutions of Virginia and Massachusetts, largely resulting from the resentment caused by the Colonial authorities of Massachusetts Bay issuing general search warrants known as "writs of assistance," which were general commands to search for smuggled goods wherever it was suspected that such could be found. These writs were the subject of the great speech by James Otis in 1761 in Paxton's Case (Quincy's Reps. 51)—a landmark in American history which was characterized by John Adams as constituting the birth of the "child" Independence.[1]

[1] For a history of the origin of the constitutional provision see note by Frank W. Grinnell, in the Massachusetts Law Quarterly for August, 1922, page 43, *et seq.* The 4th and 5th Amendments to the Federal Constitution have an entirely different history, although they are often confused. The 5th Amendment is to be traced back to an agitation conducted in the sixteenth and seventeenth centuries, and especially to that of "Freeborn John" Lilburn.

The protection granted by the Constitution thus having its roots in revolutionary times and being a result of the colonists' experience with despotism, is not to be regarded lightly nor frittered away. On the other hand, while vital principles are and ought to be unchangeable, regard must be had to the fact that in their application to changing conditions the security and consequent happiness of the body politic must be protected against an academically rigid interpretation of theoretical rights which those who originally enunciated the doctrine would be the first to disavow.

The importance of the question involved is augmented by the fact that it is in no sense confined to the temporary controversy now being waged around the enforcement of the liquor laws. The fact that intoxicating liquor is involved in the case at hand is merely casual and accidental. If the right here under investigation does or does not exist with regard to intoxicating liquor, it similarly does or does not exist with regard to narcotic drugs, weapons of crime and other instrumentalities used by the criminal classes in the warfare constantly maintained by them against organized society. The right to stop and search an automobile for liquor is no different from the right to stop and search an automobile to see whether or not it contains an infernal machine, opium, or a bandit concealed beneath a laprobe, or, indeed, to discover whether or not the operator of the vehicle has in his possession the license card provided by the automobile statutes of the State. The question, therefore, must be removed from the atmosphere of the prohibition acts into one of the general extent of the police power under similar circumstances.

Furthermore, the distinction must be borne in mind between the existence and the possible abuse of power. Any conceded power may be employed in such a tactless and arbitrary manner as to amount to oppression. A municipal department of public safety, if overzealous in attempting to enforce any law, may justly provoke the citizens of a municipality into an attitude of irritation and opposition.

Having regard for these considerations as a background to the question for determination, the court believes that the search and seizure in the present cases was not unreasonable, and therefore not in violation of the Constitution for the following reasons:

(*a*) In the first place, the very use of the term "unreasonable" in the Constitution showed an intent on the part of the framers to leave to future generations and varying circumstances the question as to what, under given conditions, is or is not an "unreasonable" search and seizure. The term is like that of "excessive bail," "excessive fines," "freedom of speech," "cruel and unusual punishment," etc. Whether a search is or is not unreasonable depends upon the circumstances, and is not influenced by the fact that it is without warrant. A search without warrant may be reasonable, and a search with warrant may be unreasonable: O'Connor *v.* United States, 281 Fed. Repr. 396; United States *v.* McBride, 287 Fed. Repr. 214; Agnello *v.* United States, 290 Fed. Repr. 671; United States *v.* Snyder, 278 Fed. Repr. 650. See also Wakely *v.* Hart, 6 Binney, 316. For example, nobody has ever doubted the reasonableness of searching persons and their baggage upon entering the country, even though they be citizens returning from a temporary sojourn abroad,

and no one has ever asserted the necessity of a search warrant for such proceeding. So, with the greater development of social organization and complexities in industrial life, the bureaus and departments of government are constantly sending agents to search premises without specific warrants for the purpose of ascertaining whether factories or workshops are employing child labor or unguarded machinery in violation of law; to inspect mines, elevators, fire escapes, the manufacture of food products and the like. These instances are cited merely to show that the question as to what is or is not a reasonable search changes with the changing habits, conditions, and views of society.

That being so, what is the situation with regard to the search of automobiles? These are a development of very modern times. To obtain a search warrant for use in connection with a fleeting automobile upon the highways is impossible, and yet, as every one knows, the automobiles have revolutionized crime and its possibilities. Unless the right to search vehicles without warrant exists, the subjecting of the community to the perpetration of crime is greatly intensified. The fact that it is convenient or desirable that this right should exist is, of course, not a conclusive argument that it does exist, but it is eminently a fair consideration in determining whether or not the exercise of it is "reasonable." This view of the matter is well expressed in People *v.* Case, 190 N. W. Repr. (Mich.) 289, where it is said: "The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in battalions, until the slower, animal-drawn vehicles, with their easily noted individuality,

are rare. Constructed as covered vehicles to standard form in immense quantities, and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious question far deeper and broader than their use in so-called 'bootlegging' or 'rum-running,' which in itself is no small matter. While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfuly utilized to facilitate commission of crime of all degrees, from those against morality, chastity and decency to robbery, rape, burglary and murder is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws. Whether search of and seizure from an automobile upon a highway or other public place without a search warrant is unreasonable is, in its final analysis, to be determined as a judicial question, in view of all the circumstances under which it is made." See, also, United States *v.* Rembert, 284 Fed. Repr. 996; United States *v.* Bateman, 278 Fed. Repr. 231; Houck *v.* State, 140 N. E. Repr. (Ohio) 112.

We are impressed by the thought that the makers of the Constitution, in this, as in so many other clauses of that document, used general phraseology because they foresaw developments of civilization

which would require adaptation of principles to necessities arising from changing conditions, and we believe that the search of an automobile without a warrant is not "unreasonable" within the meaning of the Constitution, although a similar search of a stationary or permanent habitation might, under otherwise identical circumstances, be wholly unreasonable.

(*b*) We arrive at the same conclusion from another aspect of the question with reference to the nature and use of automobiles. When the Constitution was adopted, the only subjects to which the 4th Amendment could apply were the persons of the individual citizens, their homes, and their stores and warehouses. The rights of a person to privacy, to living in his home uninterrupted by official espionage, and to conducting the ordinary mercantile pursuits, were all antecedent in point of time to the organization of the Federal Government and to the formulation of its Constitution and laws. These rights were what the eighteenth century French philosophers would have called "natural rights," and as such they were peculiarly the subject of protection against the despotism of organized society and of its official representatives. Automobiles, viewed from the standpoint of personal property, are in an entirely different position. No one has a right to operate a motor-vehicle upon the highways of the Commonwealth or of a municipality without a preliminary license granted by the State. No one needs such a license to live, to inhabit a home, or to transact most lines of industry. There are, however, certain activities—for example, the sale of liquor in preprohibition days, the conducting of a pawnshop, and the like—which can not be carried on except by special per-

mission, and as to which no one has a natural or inalienable right. The operation of a motor vehicle is in this class. The automobile, an invention of recent origin, is peculiarly the subject of governmental control, and were this not so modern life and society would be hopelessly imperiled. If, therefore, it be true, as it is true, that a citizen has no right to use or to operate an automobile at all without permission from the Commonwealth, it must follow that one must obtain such permission *cum onere*, that is, subject to such control or limitations as the State may see fit to impose upon its licensees as conditions precedent to its enjoyment. Can anyone doubt, for example, that in granting a license the State may constitutionally provide, as in fact it does provide, that every operator of a motor vehicle may be stopped at any time by an officer and made to exhibit his license card, and may even be compelled to write his name in the presence of the officer for the purpose of establishing his identity, or that any vehicle may be stopped by an officer for the purpose of inspecting it as to its equipment and operation and for securing "such other information as may be necessary"? Act of June 14, 1923, §23, P. L. 718.

In short, the court is of opinion that the constitutional provision as to searches and seizures is quite distinguishable in its application to individuals, their habitations and business places on the one hand, and to motor-vehicles on the other, because the rights in the one case are entirely independent of government, and in the other are derived wholly from the state. And while we are not prepared to say that there are no limitations of the power of the state even under such circumstances, we are of opinion that in construing the constitutional clause

as to the unreasonableness of searches and seizures, such construction is properly to be varied when applied to inalienable rights over which the state has no control, and when applied to those industries and kinds of property (including, as above pointed out, automobiles) as to which no rights exist except in so far as the state may see fit to confer them.

It must be admitted that for the distinction thus drawn no authority in the law books as yet exists,[2] neither was it the subject of argument in the present case, but in principle it seems to the court to be fundamental and to be in accord with the doctrines of the common law and of constitutional interpretation.

(c) The next distinguishing feature in the present case which, in the opinion of the court, removes it from the constitutional inhibition, is the fact that the act of the officers under consideration was not directed to the securing of evidence of a crime committed, but to the actual suppression of a crime then in course of perpetration. It is, of course, an elementary legal principle that, a crime having been completed, no right of search or seizure on the part of governmental agencies exists for the purpose of obtaining evidence which may be desired to prove the fact of the crime or the identity of the criminal who committed it. In the present case, however, when the officers stopped the automobiles, the operators of the vehicles were then and there in the midst of committing the crime of the illegal transportation of intoxicating liquor, and every revolution of the wheels of the trucks was a part of the perpetration of the offence. To hold, under such circumstances, that what the officers did was illegal would lead to this

[2] An intimation, however, is to be found in the opinion of Stewart, P. J., in Com. v. Schwanda, 19 North. 37; s. c., 71 P. L. J. 529.

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reductio ad absurdum, that the search having actually been made, the officers would be obliged, in effect, to apologize for their unwarranted interference and to allow the defendants to proceed upon their criminal journey. In other words, although then knowing that a crime was in progress, the officers would have no right to check it, but must allow the vehicles to proceed in a continued perpetration of the illegal act. It is difficult to see upon what principle, either of ordinary logic or intuitive common sense or legal authority, such a view is tenable. Suppose, for example, that a person, by reason of an unwarranted trespass upon another's property, happens to come into a room where a murder is being committed; will his unwarranted entry legally prevent his interposition to stop the crime? No matter how the information of the offense be obtained, whether by legal or illegal measures, can it be possible that there is anything in the law to disqualify the discover[er] from taking all reasonable measures to prevent further infraction of the law? If, in the present case, the officers had allowed the defendants to proceed upon their way, would they not thereby have made themselves in effect accomplices or accessories to such part of the crime of the illegal transportation of intoxicating liquor as thereafter would have ensued in the continued journey of the trucks? And by what other method could the defendants be prevented from further violating the law than by the officers seizing the instrumentalities by which the crime was then and there being committed, namely, the automobiles themselves and their illegal contents?

We have here, therefore, the marked difference between a search and seizure of evidence of a past crime and the stopping of a crime in actual progress,

and it is not believed that there is any intendment or implication in any constitutional provision which would tie the hands of police officers under such circumstances. This thought seems to have been the dominant one in the recent case of Com. *v.* Klein and Goodstein, 81 Pa. Superior Ct. 551, where it was said, per Mr. Justice Linn: "Appellants contend the seizure of the liquor was illegal, and that it was wrong to admit any of it in evidence. As no objection was made to this evidence during the trial, we might dismiss the assignment without further notice, but it is not apparent that it was objectionable; the parties were arrested, as the verdict establishes, committing a crime; it was proper to take and put in evidence the means by which they were committing it."

And to the same effect is the statement of the court in United States *v.* McBride, 287 Fed. Repr. 214: "Now we see that no warrant shall be issued but upon probable cause, etc. This certainly contemplates that a crime has been committed, and there is probable cause to believe that the defendant has committed it, or has certain things used in the commission of it, etc., which he is secreting, and describing the thing and place. Now, if the crime, instead of having been committed or completed, is only in the process of commission, it is manifest no warrant could be issued. There must be a completed crime, an affidavit of probable cause, and thing to be seized. This makes a complete analogy to a warrant for the arrest of a person for the commission of an offence. If the offence has been committed, the officers must have a warrant to make the arrest; but if the offence is committed in his presence, he may arrest without a warrant. . . . The analogy between arresting

and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case." See, also, State *v.* Pauley, 192 N. W. Repr. (N. Dak.) 91.

(*d*) Analogous to this distinction is the fact that there is a difference between the seizure of the evidence of a crime and that of the instrumentality by which a crime is committed.

In Heywood *v.* United States, 268 Fed. Repr. 795, it is said: "Not all searches and seizures are forbidden. Consider, first, the character of the property that may be seized. It has never been deemed unreasonable to hunt for and take stolen property, smuggled goods, implements of crime, and the like. Inasmuch as the documents in question were the tools by means of which the defendants were committing the felonies, there was no immunity in the nature of the property."

In City of Sioux Falls *v.* Walser, 187 N. W. Repr. (S. Dak.) 821, it is said: "There is a wide distinction between the seizure of property lawfully in the possession of a person and the seizure of property which is being held and used in violation of law, and in and to which property, because of such violation of law, the person in possession can claim no property rights."

In People *v.* Bowen, 198 N. Y. Supp. 306, it is said: "When stolen property shall have passed into the custody of the law and is held for the rightful owner, the thief may not question the right of the officers of the law to hold it or the manner of their acquiring its possession. So, too, officers of the law, coming into the possession of that which is used to commit crime, may not be compelled to restore it to him who claims its ownership, although the officers have obtained it from him by illegal means. A party may not

rightfully have the possession of instrumentalities used for the commission of crime, or used in the commission of crime, and since he may not rightfully have the possession of such instrumentalities, he has not the right to require their possession. In the case under consideration the seizure was not illegal, for the reason that the papers seized, on the proofs presented on this motion, were instrumentalities used by the defendant in the perpetration of the crime with which he is charged. There is such a thing as unreasonable search, and this the law does not permit. Against this a man is protected; but when a man stands charged with crime, and the instruments are found upon his person or in his house, which were a part of the means by which he accomplished the crime, such instruments or papers are legitimate evidence against him, and may be taken from him and used for that purpose. If this be not so, the dagger with which the murderer strikes down his victim could not be taken from his pocket and used against him, for the reason that it belongs to him and is found upon his person."

In United States *v.* Welsh, 247 Fed. Repr. 239, it is said: "The cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers can not be seized and used as incriminating evidence. The *corpus delicti* itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is

in no real sense the property of the defendant, but is the very unlawful thing imported contrary to the statute. I think the district attorney is right in urging that any one could arrest the person carrying it, who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment and from the evidence adduced that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected."

In Boyd *v.* United States, 116 U. S. 616, it is said: "The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property; in the other it is not."

In United States *v.* McBride, 287 Fed. Repr. 214, it is said: "In considering what may be seized, the law draws a clear distinction between things forfeited, or that it was illegal for the person to have, and his mere private books and papers, etc., which contained evidence that could be used against him, permitting the seizure of the first and denying it as to the latter, though both were held in the same way. Such things

as might be seized could be admitted in evidence over defendant's objection, though they were taken from his possession and against his consent. . . . So we see that it is not the fact that the thing was taken from his possession and against his consent that was forbidden, but it was the character of the things taken and the method of taking. Such a thing as burglar tools, though bought or made by defendant, and belonging to him as much as his private books and papers, could be taken and used against him, and it was not compelling him to be a witness against himself to take them from him." See, also, State *v.* Pauley, 192 N. W. Repr. (N. Dak.) 91; Com. *v.* Klein and Goodstein, 81 Pa. Superior Ct. 551; State *v.* Krinski, 62 Atl. Repr. (Vt.) 37; State *v.* Simmons, 183 N. C. 684; State *v.* Chuchola, 120 Atl. Repr. (Del.) 212.

Thus we see that there is a well-established distinction in regard to a search or seizure the object and the result of which is to take private property in itself legitimate, but constituting evidence of the commission of a crime, and property the possession of which is unlawful because constituting the very instrumentality for the commission of the crime, as, for example, a burglar's tools, gambling devices, narcotic drugs, and the like. And, of course, intoxicating liquor falls within the latter class. It is, under the provisions of both the Federal and state acts, contraband. As said in People *v.* Case, 190 N. W. (Mich.) 289: "When its illegal possession or transportation begins, it at once becomes the property of the state. One searching for and seizing it does not search and seize property of the person in illegal possession, and if the state makes the seizure, it is but taking possession of its own property." To the same

effect are O'Connor *v.* United States, 281 Fed. Repr. 396; United States *v.* Fenton, 268 Fed. Repr. 221; United States *v.* O'Dowd, 273 Fed. Repr. 600; United States *v.* Hilsinger, 284 Fed. Repr. 585; United States *v.* Bateman, 278 Fed. Repr. 231; United States *v.* Snyder, 278 Fed. Repr. 650.

The conclusion, therefore, is that a search which is directed toward the obtaining of mere evidence is different from one directed toward the seizure of contraband or unlawful property, and a search for the latter may be reasonable in cases where a search for the former is not.

3. It has thus been demonstrated, in the opinion of the court, that searches and seizures of the kind involved in the present controversy are not unreasonable, and, therefore, not unconstitutional, because of the four reasons above pointed out, namely, (1) that the nature of the use of automobiles makes it impossible to employ search warrants in the detection of crime committed by their means, and, therefore, the absence of such warrants can scarcely be said to be "unreasonable;" (2) that since the operation of automobiles must be licensed by the state, the constitutional provision does not apply to them in the same manner and to the same degree as in the case of one's person, dwelling house, place of business, or the like; (3) that a search and seizure is justified in order to suppress the commission of a continuing crime as contrasted with a search for evidence of a crime already committed; and (4) that such a search and seizure is different as to its reasonableness when it aims to secure the instrumentality of crime from when it seeks merely to obtain evidence of crime. Apart from this conclusion, however, as to the constitutionality of the search and seizure, we are of the

opinion that the petitioners' case must fall because of the answer to be given to the final question involved in this discussion. Even assuming the invalidity of the search and seizure, is the evidence obtained by the officers as a result thereof nevertheless admissible at the trial of the defendants?

[Here follows an extended discussion of the admissibility in evidence at the trial of the defendants, of property searched for and seized. This is omitted, as we consider that question settled by the prior decisions of this Court.]

Finding, therefore, that the Pennsylvania authorities are thus in accord with the prevailing doctrine adverted to, we summarize our conclusions as follows:

1. Both the State legislation and the common law furnish authority to police officers to stop, and, with or without a warrant, to search motor vehicles for contraband or other instrumentalities of crime—a power, however, which, of course, should never be abused by an over-zealous police administration.

2. The authority thus referred to is valid and lawful, and does not contravene the constitutional rights of citizens against unreasonable searches and seizures.

3. Even, however, if such search and seizure be unconstitutional, and, therefore, invalid, the physical evidence secured thereby as well as the testimony of the officers in regard to its discovery are competent evidence upon the trial of the criminal cause, and will not be excluded because of any alleged illegality in the method by which such evidence and testimony were obtained.

The result is that we conclude that the defendants' petitions should be, and they are, dismissed.

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